EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

o. 84-780-ADM Title: Otis R. Bowen, Secretary of Health and Human
ought: GRANTED Services, et al., Appellants
                v.
                Stephen J. Roy, et al.
ocketed:
ovember 13, 1984 Court: United States District Court for the
                Middle District of Pennsylvania

Counsel for appellant: Solicitor General

Counsel for appellee: Hessler, Joel M., Gilgin, Gary S.

No.	Date	Note	Proceedings and Orders
1	Sep 6 1984		Application for extension of time to docket appeal and order granting same until November 13, 1984 (Brennan, September 11, 1984).
2	Nov 13 1984	G	Statement as to jurisdiction filed.
3	Dec 3 1984		Brief of appellee Walter Cohen, Sec., etc. in support of petition filed.
4	Dec 19 1984		DISTRIBUTED. January 11, 1985
5	Dec 19 1984	X	Motion of appellees Stephen Roy and Karen Miller to affirm filed.
6	Dec 19 1984	G	Motion of appellees for leave to proceed in forma pauperis filed.
7	Dec 21 1984	X	Reply brief of appellants Heckler, Sec. of HEHS, et al. filed.
8	Jan 14 1985		Motion of appellees for leave to proceed in forma pauperis GRANTED. Justice Powell dissents.
9	Jun 7 1985		REDISTRIBUTED. June 13, 1985
10	Jun 17 1985		PROBABLE JURISDICTION NOTED. The case is set for oral argument in tandem with No. 84-1097, Zobrest v. Weinberger.
12	Jul 16 1985		Order extending time to file brief of appellant on the merits until August 22, 1985.
13	Jul 30 1985		Joint appendix filed.
14	Aug 16 1985		Brief of appellants Heckler, Sec. of HEHS, et al. filed.
15	Aug 23 1985		Order extending time to file brief of appellee on the merits until October 4, 1985.
17	Sep 20 1985		Brief amicus curiae of Rutherford Institute, et al. filed.
18	Sep 27 1985		Brief of appellees Stephen Roy and Karen Miller filed.
19	Oct 4 1985		Brief amicus curiae of Natl. Congress of American Indians, et al. filed.
20	Oct 7 1985		Lodging received.
21	Oct 4 1985		Brief amicus curiae of Catholic League for Religious and Civil Rights filed.
22	Nov 19 1985		CIRCULATED.
23	Nov 21 1985		SET FOR ARGUMENT, Tuesday, January 14, 1986. (1st case).
24	Aug 28 1985		Record filed.
25	Jan 3 1986	X	Reply brief of appellants Heckler, Sec. of HEHS, et al. filed.
26	Jan 14 1986		ARGUED.

FILED
NOV 13 1984
CLERK

No. 84-780

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

STEPHEN J. ROY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
KATHRYN A. OBERLY
Assistant to the Solicitor General
LEONARD SCHAITMAN
PETER R. MAIER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

66 pp

QUESTION PRESENTED

Whether 7 U.S.C. 2025(e) and 42 U.S.C. 602(a)(25), which require all applicants for and recipients of benefits under the Food Stamp and Aid to Families with Dependent Children programs to provide their state welfare agencies with their social security numbers, violate the Free Exercise Clause of the First Amendment as applied to persons who hold a sincere religious belief that social security numbers are part of a "great evil" that should be avoided.

PARTIES TO THE PROCEEDING

In addition to appellant Heckler, the defendants named in the district court were John R. Block, Secretary of Agriculture, and Walter Cohen, Secretary of the Pennsylvania Department of Public Welfare.

In addition to appellee Roy, Karen Miller was a plaintiff in the district court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	3
A. Appellees' challenge to the SSN requirement	4
B. The role of SSNs in the administration of the AFDC and Food Stamp programs	7
C. The district court's decision	11
The question is substantial	13
Conclusion	22
Appendix A	1a
Appendix B	24a
Appendix C	26a
Appendix D	27a
Appendix E	36a
Appendix F	37a

TABLE OF AUTHORITIES

Cases:

Arthur v. *Washington State Dep't of Social & Health Services*, 19 Wash. App. 542, 576 P.2d 921	18
Atwood v. *Idaho Dep't of Health & Welfare*, No. 83-3066 (D. Idaho filed May 23, 1983)	15
Bob Jones University v. *United States*, No. 81-3 (May 24, 1983)	14
Braunfeld v. *Brown*, 366 U.S. 599	16, 20
Callahan v. *Woods*, 736 F.2d 1269	12, 15
Mullaney v. *Woods*, 97 Cal. App. 3d 710, 158 Cal. Rptr. 902	15

Cases—Continued: Page

Prince v. *Massachusetts*, 321 U.S. 158 16

Sherbert v. *Verner*, 374 U.S. 398 19

Stevens v. *Berger*, 428 F. Supp. 896 15

Thomas v. *Review Board*, 450 U.S. 707 18-19

United States v. *Lee*, 455 U.S. 252 .... 14, 15, 16, 20

Valley Forge Christian College v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 21

Walz v. *Tax Comm'n*, 397 U.S. 664 19

Constitution and statutes:

U.S. Const. Amend. I (Free Exercise Clause) 3, 15, 18, 19, 21

Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 *et seq.* 2

§ 2651(a), 98 Stat. 1147 2

§ 2651(b)(1), 98 Stat. 1149 2

Food Stamp Act of 1977, 7 U.S.C. 2011 *et seq.* 7

7 U.S.C. 2011 7

7 U.S.C. 2014 7

7 U.S.C. 2020(e)(16) 8

7 U.S.C. 2025(a)-(d) 8

7 U.S.C. 2025(d)(2) 8

7 U.S.C. 2025(e) 2, 3, 7, 20

7 U.S.C. (Supp. IV 1980) 2025(f) 20

7 U.S.C. 2025(g) 9

Social Security Act, Tit. IV, 42 U.S.C. 601 *et seq.* 7

42 U.S.C. 601 7

42 U.S.C. 602(a)(7) 7

42 U.S.C. 602(a)(18) 7

42 U.S.C. 602(a)(25) 1, 2, 3, 7-8

42 U.S.C. 602(a)(30) 9

42 U.S.C. 603(a)(3)(B) 9

42 U.S.C. 603(i) 8

Constitution and statutes—Continued: Page

Social Security Act, Pub. L. No. 98-369, 98 Stat. 1147:
§ 1137, 98 Stat. 1147 2
§ 1137(a)(1), 98 Stat. 1147 2
26 U.S.C. 1402(g) 20
26 U.S.C. 3304 2

Miscellaneous:

H.R. Rep. 97-106, 97th Cong., 1st Sess. (1981) 8
S. Rep. 93-1356, 93d Cong., 2d Sess. (1974) ... 8
7 The President's Private Sector Survey on Cost Control, (1984):
Management Office Selected Issues, Information Gap in the Federal Government 20
Report on Federal Feeding 20

In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

STEPHEN J. ROY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (App., *infra*, 1a-23a) is reported at 590 F. Supp. 600. A prior opinion of the district court (App., *infra*, 27a-35a) is unreported.

JURISDICTION

The judgment of the district court (App., *infra*, 26a) was entered on June 22, 1984. The federal appellants filed a notice of appeal to this Court on July 18, 1984 (App., *infra*, 37a). On September 11, 1984, Justice Brennan extended the time within which to docket this appeal to and including November 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. See *United States* v. *Lee*, 455 U.S. 252, 256 n.5 (1982).

STATUTORY PROVISIONS INVOLVED

At the time of the district court's decision in this case, Section 402(a)(25) of the Social Security Act, 42 U.S.C. 602(a)(25), provided:

> A State plan for aid and services to needy families with children must * * * (25) provide (A) that, as a condition of eligibility under the plan, each applicant for or recipient of aid shall furnish to the State agency his social security account number (or numbers, if he has more than one such number), and (B) that such State agency shall utilize such account numbers, in addition to any other means of identification it may determine to employ in the administration of such plan.[1]

Section 16(e) of the Food Stamp Act of 1977, 7 U.S.C. 2025(e), provides in pertinent part:

> The Secretary [of Agriculture] and State agencies shall (1) require, as a condition of eligibility in the food stamp program, that each household member furnish to the State agency their social security account num-

---

[1] The Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 *et seq.*, was signed into law on July 18, 1984. Section 2651(b)(1) of that legislation amended Section 402(a)(25) of the Social Security Act to read as follows (98 Stat. 1149):

> provide that information is requested and exchanged for purposes of income and eligibility verification in accordance with a State system which meets the requirements of section 1137 of this Act[.]

Section 2651(a) of the Deficit Reduction Act of 1984 (98 Stat. 1147), in turn added a new section (Section 1137) to the Social Security Act that establishes detailed requirements for the income and verification systems that states must use in administering various federal welfare programs. Section 1137(a)(1) of the Social Security Act now provides (98 Stat. 1147) that:

> [T]he State shall require, as a condition of eligibility for benefits under any program listed in subsection (b), that each applicant for or recipient of benefits under that program furnish to the State his social security account number (or numbers, if he has more than one such number), and the State shall utilize such account numbers in the administration of that program so as to enable the association of the records pertaining to the applicant or recipient with his account number[.]

The programs included in the expanded income and eligibility verification system established by the Deficit Reduction Act of 1984 are the Aid to Families with Dependent Children program, the Medicaid program, the unemployment compensation program of Section 3304 of the Internal Revenue Code (26 U.S.C.), the Food Stamp program, and any state program under a plan approved under Titles I, X, XIV, or XVI of the Social Security Act. Pub. L. No. 98-369, § 2651(a), 98 Stat. 1148-1149.

ber (or numbers, if they have more than one number), and (2) use such account numbers in the administration of the food stamp program.

STATEMENT

Appellees Stephen J. Roy and Karen Miller refused to comply with the requirement, contained in 42 U.S.C. 602(a)(25) and 7 U.S.C. 2025(e), that participants in two federal programs, the Aid to Families with Dependent Children program and the Food Stamp program, furnish their state welfare agencies with the social security numbers (SSNs) of the members of their household as a condition of receiving program benefits. Appellees contended that compliance with the SSN requirement as applied to their three-year old daughter, Little Bird of the Snow, would violate their religious beliefs and constitute an impermissible burden on their First Amendment right to freely exercise their religion. Because appellees refused to comply with the statutory requirement that they provide an SSN for Little Bird of the Snow, the Pennsylvania Department of Public Welfare terminated AFDC and medical assistance benefits payable to appellees on Little Bird of the Snow's behalf and instituted proceedings to reduce the level of food stamps being received by appellees' household. Appellees then commenced this action against the Secretary of the Pennsylvania Department of Public Welfare, the Secretary of Health and Human Services, and the Secretary of Agriculture, challenging the constitutionality of the SSN requirement as applied to themselves. The district court held that the SSN requirement is unconstitutional as applied to appellee Roy and enjoined the state and federal defendants from denying program benefits to appellees on account of their failure to provide an SSN for Little Bird of the Snow. The court also enjoined Secretary Heckler from "using or disseminating" the SSN already assigned to Little Bird of the Snow in response to an application made by her mother, appellee Miller, shortly after Little Bird of the Snow's birth.

At trial, appellees introduced evidence concerning Roy's religious beliefs, and the defendants introduced evidence explaining the purposes of the SSN requirement in the ad-

ministration of the AFDC and Food Stamp programs. That evidence may be summarized as follows.

A. Appellees' Challenge To The SSN Requirement

Appellee Roy is a Native American descended from the Abenaki Tribe.[3] Roy testified that he derives his religious beliefs "[p]artly from intuition, partly from hearing other Abenakis speak, partly from what [he] read about religious teachings" (5/17/84 Tr. 57, 64). The central tenet of Roy's beliefs appears to be the legend of Katahdin, which is about the "great evil." The "great evil" consists of three separate but related "evils." The first evil is the widespread use of computers, the second evil is people's casual acceptance of the widespread use of computers, and the third evil is the proliferation of weaponry that increasingly employs computer technology, thereby making the use of the weapons to kill people a "sterile" act. App., *infra*, 4a. The legend of Katahdin is "ancient," predating the arrival of the white man. It does not deal specifically with nuclear energy or computers, but Roy's "intuition" tells him that the legend would be concerned about computers and nuclear weapons. 5/17/84 Tr. 143-144.

Roy considers social security numbers to be part of the "great evil," apparently because they are "used by the computers" and therefore rob people's spirits in a manner similar to what non-Native psychologists would call "dehumanization" (5/17/84 Tr. 81-82). In addition, Roy believes that the evil of SSNs is related to their function as unique personal identifiers. He testified that an SSN would be used to rob Little Bird of the Snow "of her ability to have greater power in that this number is a unique number. * * * it's applied to her and only her; and being applied to her, that's what offends us, and we try to keep her person unique, and we try to keep her spirit unique, and we're scared that if we were to use this number, she would lose control of that and she would have no ability to protect herself from any

---

[3] Appellee Miller is not an Indian by blood, did not testify at trial, and, so far as the record reflects, holds no religious beliefs relevant to this case. The government moved to have Miller dismissed as a plaintiff, but the district court denied the motion. 5/18/84 Tr. 40-41, 46-47.

evil that that number might be used against her" (*id.* at 78-79; see also *id.* at 115).

Roy testified that he objects not to all numbers (but see pages 6-7, *infra*) but just to "the manner [in which the SSN] is used because it represents a great evil to us" (5/17/84 Tr. 79). Roy has no specific religious objection to receiving numbered food stamps or numbered AFDC checks (*id.* at 92). On the other hand, Roy testified that he would be upset "to some degree" by the use of *any* sort of information that identified himself and his family as individuals (*id.* at 120). He also testified that he might be "a little" upset if he were to learn that the state welfare department uses a unique case number to identify Little Bird of the Snow (*id.* at 127).

Although the case was tried on the assumption that Little Bird of the Snow did not have an SSN and that it would violate Roy's religious beliefs to obtain one for her, it was learned on the last day of trial that she does have one.[5] Her mother, appellee Miller, applied for Little Bird of the Snow's SSN when the child was born, apparently without Roy's knowledge. When Roy received Little Bird of the Snow's social security card in the mail, he and Miller allegedly returned it to the Social Security Administration and asked that it be "revoked." Roy testified that the Social Security Administration advised him in writing that Little Bird of the Snow's SSN would remain "dormant," but Roy did not produce any correspondence to support his testimony. 5/22/84 Tr. 149-151.

Roy himself uses a social security number, as does Miller and their older daughter, Renee. Roy does not object to providing SSNs for himself, Miller, and Renee because all three acquired their numbers before Roy came to hold his current religious beliefs and therefore the spirits of all three have been sufficiently robbed that they can no longer be prepared for greater power. 5/17/84 Tr. 82-83, 116-117.

---

[5] Roy was asked whether he ever told his attorney that Little Bird of the Snow already had an SSN. Roy stated that he had but seemed to be unsure whether the attorney was paying attention during their consultation. 5/22/84 Tr. 149-151.

With respect to Little Bird of the Snow, on the other hand, Roy believes that he can still prepare her for greater power and that her spirit has not yet been robbed by overuse of the SSN she acquired shortly after her birth. Roy believes that Little Bird of the Snow must decide for herself whether she wishes to use an SSN, but he does not know when she will be ready to make that decision or when he will discuss the matter with her. 5/17/84 Tr. 86, 124, 132-133, 138-139.

During the course of trial, Roy was asked about various alternatives to the use of an SSN for Little Bird of the Snow. The district judge explained his system of converting numbers into words as a device to remember telephone numbers; for example, the district judge remembers the telephone number of the Chief Judge of the District by calling him "Phillippino Ovenpot." 5/17/84 Tr. 147-148. Using this system, the judge asked Roy whether he would object to Little Bird of the Snow's being given the number 515-94-1802 as her SSN, which represented the judge's conversion of Little Bird of the Snow's name into a nine-digit number.[4] Although he saw "a lot of good" in the suggestion, Roy was unwilling to accept this alternative because the special number still would apply uniquely to Little Bird of the Snow. In addition, Roy felt that Little Bird of the Snow would have to have some say in the decision to accept or reject the judge's suggestion, but she is currently incapable of making such a decision. 5/22/84 Tr. 144-145.

Roy also was unwilling to select any other SSN from a group of numbers that the government could make avail-

---

[4] A government witness testified that the number 515-94-1802 has not been assigned to anyone else and that the Social Security Administration occasionally assigns special numbers upon request. The witness did note that the number created by the judge, because of its first three digits, would normally be assigned to someone in Kansas rather than Pennsylvania, and that even in Kansas the number is approximately 30,000 numbers ahead of numbers currently being issued. Because computers are programmed to reject "impossible" account numbers, some sort of computer modification would have to be made so that the number 515-94-1802 would not be rejected. The witness did not testify, however, that any such modification would be impossible. 5/22/84 Tr. 56-58.

BEST AVAILABLE COPY

able, and he testified that he would object to any other system of unique numerical identifiers (5/17/84 Tr. 126-127). The only alternatives acceptable to Roy were the use of his own SSN for Little Bird of the Snow or the use of her name alone (*id.* at 14, 90). Roy did not believe that the use of his SSN for Little Bird of the Snow would harm her because the number would not be unique to her (*id.* at 90), and he did not object to the use of her name alone because he believes that her name would protect her from any evil that might otherwise befall her while her records were being processed through the computer system (*id.* at 91-92).

B. The Role Of SSNs In The Administration Of The AFDC And Food Stamp Programs

The AFDC program, established by Title IV of the Social Security Act, 42 U.S.C. 601 *et seq.*, is a jointly-funded federal-state program. Its purpose is to encourage "the care of dependent children in their own homes or in the homes of relatives" by providing funds for the support of such children. 42 U.S.C. 601. Eligibility for the program is based on financial need. Dependent children and their parents or other caretaker relatives are eligible for a grant if their income and resources are less than a set minimum subsistence level. 42 U.S.C. 602(a)(7) and (18).

The purpose of the Food Stamp program, as established in the Food Stamp Act of 1977, 7 U.S.C. 2011 *et seq.*, is to "permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation." 7 U.S.C. 2011. The Food Stamp program is jointly administered by the state and federal governments. As is the case under the AFDC program, eligibility for the Food Stamp program is based on financial need. 7 U.S.C. 2014.

In order to receive benefits under either program, therefore, a household must establish its financial eligibility. To make possible the verification of income, resources, and other eligibility factors, and to aid in the detection of fraud, Congress has required benefit applicants and recipients to furnish the administering state agencies with the SSNs of each member of their household. 7 U.S.C. 2025(e); 42

U.S.C. 602(a)(25); see S. Rep. 93-1356, 93d Cong., 2d Sess. 49 (1974); H.R. Rep. 97-106, 97th Cong., 1st Sess. 58, 60 (1981). Congress has not chosen to require benefit applicants and recipients to furnish any other self-identifying information to their state welfare agencies; although state agencies commonly request additional information, the SSN requirement is the only information mandated by federal statute.[8]

As the record in this case reflects, the AFDC and Food Stamp programs are truly massive. In fiscal year 1981, an average of nearly four million families received AFDC payments each month. Affidavit of Harris G. Factor ¶ 3 [hereinafter cited as Factor Aff.]. These families included more than 11 million persons, of whom 7½ million were children. *Ibid.* In that same year, the federal government spent nearly $8 billion to fund AFDC programs in the states and other United States jurisdictions. Similarly, in fiscal year 1982, an average of approximately 20 million persons received food stamps each month. Affidavit of Virgil Conrad ¶ 3 [hereinafter cited as Conrad Aff.]. In that same year, the federal government spent approximately $11 billion on the Food Stamp program. *Ibid.*

The magnitude of these programs requires a computerized system based on unique identifiers such as SSNs for the management of data concerning benefit applicants and recipients. Requiring all applicants and recipients to provide SSNs serves a multitude of discrete purposes, only some of which need be noted here. First, the requirement enables state welfare agencies to verify applicants' resources and income. Factor Aff. ¶ 4; Conrad Aff. ¶ 9.[9] Ob-

---

[8] Congress has authorized the use of photographic identification cards in the administration of the Food Stamp program. 7 U.S.C. 2020(e)(16). Congress has not made the use of such cards mandatory, however, choosing instead to leave the matter to the discretion of the Secretary of Agriculture. *Ibid.*

[9] State governments have a particularly strong incentive to employ SSNs in the administration of these programs because they are under a congressional mandate to reduce their payment error rates. 7 U.S.C. 2025(c)(2); 42 U.S.C. 603(i). Moreover, the federal government reduces the level of reimbursement to states when their payment error rates exceed a certain level. 7 U.S.C. 2025(a)-(d); 42 U.S.C. 603(i). On

taining applicants' SSNs is particularly necessary for achievement of this task because the records systems of other governmental entities and private entities that state welfare agencies consult to verify the assets and income of welfare applicants utilize SSNs for identification purposes. For example, many private and public institutions, including banks, businesses, hospitals, schools, and state and local service agencies, maintain their records based upon SSN identification. 5/18/84 Tr. 68-69, 81-83; 5/21/84 Tr. 151-153, 156, 179.

Second, the statutory SSN requirement is necessary in order to ascertain whether AFDC applicants are receiving other federal benefits that would render them ineligible for AFDC benefits or require a reduction in the level of AFDC benefits provided. 5/18/84 Tr. 62-63, 87-88. Similarly, SSNs are used to keep track of persons no longer entitled to receive food stamps because of past abuses of the program. 5/21/84 Tr. 153.

Finally, the SSN requirement is an essential tool in the government's efforts to combat welfare fraud and waste. A few examples will suffice. Upon learning of reports that many federal and military employees were receiving AFDC benefits, the Inspector General of the Department of Health and Human Services launched "Project Match" in 1977 to cross-check federal military and civilian employee rolls against state AFDC rolls. Initially, 26 states submitted computer tapes for this match, and 33,000 apparent matches were forwarded to the federal agencies for submission of payroll data. Approximately 33% of these cases were found to be overpaid or ineligible for benefits. Interjurisdictional matches were also undertaken in 1977 to match tapes from participating states against each other in

---

the other hand, the federal government provides states with an incentive to improve the reliability of their programs by agreeing to pay a higher portion of the administrative costs incurred by a state in setting up a system that meets various federal standards, including such elements as cross-matching the income reports of welfare applicants and recipients against records of the Social Security Administration, state income tax records, vital statistics bureaus, and motor vehicle registrations. 7 U.S.C. 2025(g); 42 U.S.C. 602(a)(30), 603(a)(3)(B). See also 5/18/84 Tr. 59-62; 5/21/84 Tr. 169-171.

search of instances in which individuals might be drawing grants from two or more jurisdictions. Out of the initial 26 states that were matched in 1977, 9,000 individuals were identified as receiving duplicate welfare payments. A second interjurisdictional match of all 50 states identified an additional 8,000 individuals. The Inspector General of HHS estimated savings of $7.9 million in reduced and terminated AFDC payments in the first year following the federal employee and interjurisdictional matches. Factor Aff. ¶¶ 6, 7. Interjurisdictional matches have continued in subsequent years, and each year's match uncovers more fraud and abuse. Factor Aff. ¶¶ 8, 9. Interjurisdictional matches cannot be performed without SSNs because SSNs are the only common element in the data systems of the various states. 5/18/84 Tr. 76-80, 97-99, 111.[9]

SSNs are required for all members of a household, including children, because the various data banks that are consulted to verify eligibility and detect fraud may contain information about each member of the household. For example, children may have bank accounts in their own names, and their unearned interest income must be considered in determining a household's total income and resources. If the SSNs of only the parents were required, such information would go undetected. In addition, it is not uncommon for children to be improperly claimed as dependents by more than one household. Without an SSN requirement applicable to children, therefore, state welfare agencies would be unable to detect improper payments or cases in which benefits are sought on behalf of nonexistent children. 5/18/84 Tr. 100, 101-102; 5/21/84 Tr. 159.

---

[9] Although certain types of intrastate matches may be performed without SSNs, the reliability of those matches is significantly less than matches performed with SSNs. Duplication of names, misspellings, variations in the manner in which nonnumerical data are entered into computers, and various other factors all combine to reduce the effectiveness of any system of cross-checking that does not employ SSNs. 5/18/84 Tr. 95-97, 106-107; 5/21/84 Tr. 157.

C. The District Court's Decision

The district court issued an opinion (App., *infra*, 1a-23a) holding that the SSN requirement is unconstitutional as applied to appellee Roy. The court first held that the case was not moot despite the surprise discovery on the last day of trial that Little Bird of the Snow has had an SSN since birth (see page 5, *supra*). The court reasoned (App., *infra*, 11a) that, while Roy would have preferred that no SSN had ever been established for Little Bird of the Snow, "Roy sincerely believes that the spirit of Little Bird of the Snow has not been robbed by the mere establishment of a social security number for her," and that Roy "further believes that no substantial harm will befall Little Bird of the Snow until her social security number is 'used.'" Accordingly, the court concluded that appellees' desire to obtain welfare benefits without the government's using Little Bird of the Snow's SSN saved the case from mootness. *Id.* at 11a-12a.

The district court next concluded that Roy's beliefs concerning SSNs are religious in nature (App., *infra*, 13a-14a) and that they are sincerely held (*id.* at 14a-15a).[9] At the same time, the court found that the government's interest in maintaining the SSN requirement is "substantial" and "great" (*id.* at 15a, 18a). (The court previously had issued an opinion on the parties' motions for summary judgment in which it found that the governmental interest is "compelling" (*id.* at 32a). The court did not alter that con-

---

[9] With respect to appellee Miller, the court stated (App., *infra*, 14a-15a):

> [B]ecause she did not testify at the trial of this case, we are unable to determine whether she sincerely holds religious beliefs identical or similar to those held by Mr. Roy. Plaintiff Miller does not claim that she has been denied cash assistance for Little Bird of the Snow but she contests Defendants Block and Cohen's threatened termination of food stamps for Little Bird of the Snow. We are hesitant to grant Miller injunctive relief against the threatened termination of food stamps in light of her failure to testify at trial. Nevertheless, it would be inequitable to hold that Plaintiff Roy need not provide a social security number for Little Bird of the Snow, while allowing the government to require Miller to provide a social security number for Little Bird of the Snow, thereby effectively denying Roy the relief he seeks.

clusion in its final opinion.) The court then stated that it would "consider this case under the reasonable less restrictive alternative standard" (*id.* at 18a); in other words, it would uphold the SSN requirement unless it were shown that the governmental interest could be served "by some reasonable less restrictive alternative" (*id.* at 32a).*

Although the district court stated (App., *infra*, 18a) that it would consider appellees' "interest as against the government's interest in this particular case as well as the government's interest in the social security number requirement as a general matter," in fact the court's analysis focused entirely on this particular case. Thus, the court stated that the government's *general* interest in maintaining the SSN requirement "does not appear to be threatened by the claim presented in this case *because the Plaintiffs' claim appears to be extremely unusual.*" *Ibid.* (emphasis added). Similarly, for its case-specific analysis, the court held that the government's interest "in avoiding a grant of an exemption to the social security number requirement to the Plaintiffs in this case is very small." *Id.* at 19a. The court summed up its conclusion as follows (*ibid.*):

> It appears to the Court that the harm the Government might suffer if the Plaintiffs prevailed in this case would be, at worst, that one or perhaps a few individuals could fraudulently obtain welfare benefits. Such a result would obtain only if (1) Little Bird of the Snow attempted fraudulently to obtain welfare benefits or someone else attempted fraudulently to obtain such benefits using Little Bird of the Snow's name *and* (2) identification procedures available to the Defendants that do not require utilization of a social security number failed to expose the fraud. This possibility appears to the Court to be remote.

In view of this conclusion, the district court enjoined defendants from denying benefits to appellees for Little Bird

---

* The court derived this test from *Callahan* v. *Woods*, 736 F.2d 1269 (9th Cir. 1984), a case raising a nearly identical challenge to the SSN requirement. Although we believe that *Callahan* was wrongly decided, we have not sought review of that decision in this Court because the court of appeals' ruling is interlocutory.

of the Snow because of appellees' failure to provide an SSN for Little Bird of the Snow (App., *infra*, 21a). The court also enjoined Secretary Heckler from "using or disseminating" the SSN already assigned to Little Bird of the Snow (*id.* at 22a) and ordered the Secretary to "notify any agency, individual, business entity or other third party to which the number has been provided and demand that said agency permanently refrain from: (1) making any use of the number and (2) disseminating the number to any other agency, person, individual, business entity, or any other third party" (*id.* at 24a-25a). These injunctions are to remain in effect until Little Bird of the Snow's 16th birthday (*id.* at 22a). Finding that appellees have no current religious objection to the past establishment of an SSN for Little Bird of the Snow, the court denied their request that her SSN be "eliminated" (*id.* at 21a-22a). The court also denied appellees' claim for payment of past due benefits and for damages against the defendants in their personal capacities (*id.* at 22a-23a).

THE QUESTION IS SUBSTANTIAL

The district court has held unconstitutional as applied to appellee Roy the requirement that applicants for and recipients of AFDC and food stamps provide to their state welfare agencies a social security number for every household member who receives benefits. As the only requirement Congress has deemed necessary to impose on the way in which recipients of these benefits are identified, the statutory provisions at issue come to this Court with a heavy presumption of constitutionality. The district court's invalidation of these provisions seriously jeopardizes the government's ability to combat fraud in federal welfare programs and generally to promote the administrative efficiency of such programs through the uniform application of a logical, neutral rule that undeniably serves a compelling governmental interest. The district court's ruling was based on a flawed premise—that the smaller the number of persons objecting to a neutral requirement on religious grounds, the greater their claim to an exemption from the requirement. No decision of this Court supports such a peculiar re-

sult. Instead, it is clear that, in the circumstances here presented, the individual's interest in religious liberty must yield to the greater interest of society in the efficient and effective administration of its welfare programs.

1. a. This Court has repeatedly emphasized that although "the Free Exercise Clause provides substantial protection for lawful conduct grounded in religious belief, * * * '[n]ot all burdens on religion are unconstitutional. . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.'" *Bob Jones University* v. *United States*, No. 81-3 (May 24, 1982), slip op. 28 (quoting *United States* v. *Lee*, 455 U.S. 252, 257-258 (1982)).

In both *Bob Jones University* and *Lee*, this Court addressed the question presented here, namely, how to resolve the conflict between a requirement that serves a compelling governmental interest and the contrary dictates of a sincerely held religious belief. When such a conflict occurs, "[t]he remaining inquiry is whether accommodating the * * * belief will unduly interfere with fulfillment of the governmental interest." *United States* v. *Lee*, 455 U.S. at 259. If the belief "cannot be accommodated with that compelling governmental interest, * * * and no 'less restrictive means' * * * are available to achieve the governmental interest," the government's interest must prevail. *Bob Jones University*, slip op. 29 (citations and footnote omitted). As the Court concluded in *Lee*, 455 U.S. at 259 (footnote omitted):

> To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, see, *e.g.*, *Thomas* [v. *Review Board*, 450 U.S. 707 (1981)]; *Sherbert* [v. *Verner*, 374 U.S. 398 (1963)], but there is a point at which accommodation would "radically restrict the operating latitude of the legislature." *Braunfeld* [v. *Brown*, 366 U.S. 599, 606 (1961)].

That point has been exceeded by the district court's decision in this case.

b. We do not contend that Roy's beliefs are not religious in nature, nor do we contend that his beliefs are not sin-

cerely held. By the same token, neither the district court nor appellees question the fact that the government has a compelling interest in the SSN requirement as a general matter. The dispute in this case is whether the "least restrictive means" inquiry is to be applied to the programmatic governmental interests of verifying eligibility, preventing and detecting fraud, and administering massive programs efficiently, or whether the Free Exercise Clause requires a case-by-case determination of each individual claim to an exemption. In our view, the district court erred in considering appellees' claim in isolation and in placing its primary focus on the number of persons who potentially might seek an exemption from the SSN requirement.[10] Instead, it should have focused on the programmatic considerations addressed by Congress in enacting the SSN requirement and Congress's judgment that there should be no exceptions to that requirement.

This Court's decision in *Lee* demonstrates the error of the district court's analysis. There, the Court rejected the claim of an Amish employer for an exemption from paying social security taxes for his Amish employees. The Court did not confine its analysis to the effect on the social security program of exempting only the Amish; if it had, the programmatic effect would have been beneficial because the Amish not only oppose paying into the social security system but also oppose receiving benefits, and benefit payouts far exceed contributions. See *Lee*, 455 U.S. at 262 (Stevens, J., concurring). Instead, the Court looked to the government's compelling interest in uniform administration of the social security program and tax collection in general and concluded that mandatory participation by all employers was essential to the fiscal vitality of the program. *Id.* at 258-260.

---

[10] Though we do not believe that the number of persons seeking an exemption is relevant to the correct disposition of this case, we note that appellees' objections are not unique. See *Callahan* v. *Woods*, 736 F.2d 1269 (9th Cir. 1984); *Stevens* v. *Berger*, 428 F. Supp. 896 (E.D.N.Y. 1977); *Mullaney* v. *Woods*, 97 Cal. App. 3d 710, 159 Cal. Rptr. 268 (1979); *Atwood* v. *Idaho Dep't of Health & Welfare*, No. 82-2026 (D. Idaho filed May 23, 1983).

Like *Lee*, the earlier cases of *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), and *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), also demonstrate the impropriety of ignoring a legislative determination that individualized exemptions would undermine the purposes behind a neutral law of general applicability. In *Braunfeld*, the appellants were Orthodox Jewish merchants whose religious convictions required that their places of business remain closed on Saturdays. They sought an injunction to prevent enforcement against them of a state Sunday-closing law, on the ground that closing their businesses on Sundays interfered with their ability to earn a living. The Court rejected the claim, noting that "to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity" (366 U.S. at 608).[11]

Prince likewise involved a state statute that imposed an absolute ban on the activity in which the appellants there sought to engage. The statute at issue was a child labor law forbidding children from engaging in street sales of magazines, newspapers, and other merchandise. Unlike the Jewish merchants in *Braunfeld*, whose religious faith was only indirectly burdened by the statute in question (see 366 U.S. at 605-607), the appellants in *Prince* were Jehovah's Witnesses whose religious faith specifically required that they engage in the activity the state sought to prohibit—street sales of their religious tracts. Nevertheless, the Court held that the statute was constitutional as applied to the appellants, even though there was no danger to the particular child in question, who had been closely supervised by her aunt.

---

[11] The Court also noted that to permit the exemption might provide the Jewish merchants with a competitive advantage over other merchants who had no religious objection to the Sunday-closing law. *Braunfeld*, 366 U.S. at 608-609. A similar problem looms large in this case because the district court's decision effectively assures that the welfare applications of appellees and those who share their beliefs will not receive the same degree of scrutiny that all other applicants undergo.

These cases clearly demonstrate that when the legislature seeks to advance a compelling governmental interest through uniform application of a facially neutral requirement, it is not relevant that granting exemptions in rare cases might work only a minute or incremental interference with the governmental interest. This analysis compels reversal of the decision below. Achievement of the compelling governmental interest in preserving and promoting the fiscal integrity of the AFDC and Food Stamp programs is dependent upon the proper verification of income and resources and the correct payment of benefits to needy individuals. Whether or not any one individual might seek to collect benefits to which he is not entitled is irrelevant; the pertinent point is that the programs as a whole cannot be managed effectively without the SSN requirement. Programs the size of the AFDC and Food Stamp programs cannot possibly be administered without the aid of computer technology, and computers communicate with each other in numbers. One who is opposed on religious grounds to computers and numbers might well find the SSN requirement objectionable, but no decision of this Court suggests that such an indirect burden on religious freedom is a sufficient basis for striking down a neutral procedural requirement that is undeniably essential to sound program administration.

Moreover, the decision below leads to absurd consequences. Essentially, the court has held that government must accommodate those individuals holding the most unique and idiosyncratic religious beliefs because the cost of exempting those few individuals from a facially neutral procedural requirement would be quite small. The logical corollary to this holding is that government may refuse to accommodate religious beliefs so widely held that the administrative burden and programmatic impact would be deemed too great. In essence, the right to the free exercise of religious beliefs would shrink as the number of persons who share those beliefs grows. Such a result defies common sense.

In addition, there would appear to be no limit to the "accommodations" that could be required of government under

the district court's analysis. For example, Roy objects to the use of computers but not strongly enough to protest issuance of his AFDC check by a computer. Another plaintiff, however, could insist that the government process his check manually or that he be paid in cash instead of by check. Viewing each case in isolation, as the district court's decision requires, the government would be obliged to accommodate these sorts of demands, because it unquestionably could do so in a handful of instances without undue burden or expense. Logic compels the conclusion that there are limits to the accommodations government is required to make in administering facially neutral program requirements, and those limits have been exceeded by the decision below.[18]

c. The present case can readily be distinguished from other cases in which this Court has required states to permit religious exemptions from otherwise applicable statutory requirements. *See Thomas* v. *Review Board*, 450 U.S.

---

[18] Even if a case such as this were to be analyzed on an individual, rather than programmatic, basis, we submit that the district court erred in concluding that the government's compelling interest can be satisfied without requiring Roy to furnish an SSN for Little Bird of the Snow. There is something fundamentally wrong with the notion that an individual can claim an entitlement to government benefits while at the same time refusing to comply with that portion of the program designed to verify eligibility and most effectively detect fraud. If appellees wish to avail themselves of government benefits, the Free Exercise Clause does not stand as an obstacle to the government's ability to ensure, as effectively and efficiently as possible, that they are legitimately entitled to receive them. It is undisputed that the SSN requirement is by far the most effective means for achieving this compelling governmental interest, and appellees' suggested "alternatives" simply do not satisfy Congress's purposes. For example, the dual use of Roy's own SSN to identify himself and Little Bird of the Snow is inherently inconsistent with the role of SSNs as unique personal identifiers. The use of Little Bird of the Snow's name alone is likewise an ineffective alternative. Though her name is ostensibly unusual (but see *Arthur* v. *Washington State Dep't of Social & Health Services*, 19 Wash. App. 642, 648, 576 P.2d 901, 905 (1978) ("A name affords neither precision nor permanence. A social security number does.")), computer cross-matching by name is simply not as reliable as computer cross-matching by SSN, and in some cases it is not even possible.

707 (1961); *Sherbert* v. *Verner*, 374 U.S. 398 (1963).[18] Both *Thomas* and *Sherbert* involved applicants for unemployment compensation who, as a result of having been denied benefits, were forced to choose between receiving no income or continuing to engage in employment-related activity that violated their religious beliefs. In both cases, this Court held that the states were required to accommodate the religious beliefs of the individuals involved.

In contrast to the present case, however, the states in *Thomas* and *Sherbert* could not demonstrate a compelling governmental interest. Compare *Thomas*, 450 U.S. at 719, and *Sherbert*, 374 U.S. at 406-409, with App., *infra*, 15a, 18a, 22a. Moreover, the statutes under consideration in *Thomas* and *Sherbert* explicitly permitted exemptions from their general requirements based on individualized determinations of "good cause."[19] Because the legislatures had clearly contemplated such exemptions under certain circumstances, the states were unable to persuade this Court that they had sought to accomplish their objectives in the least restrictive manner with respect to the individuals at hand. Thus, the statutes in *Thomas* and *Sherbert*, unlike the statutes here, provided by their own terms the necessary "play in the joints," *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970), to allow for exemptions grounded in the Free Exercise Clause.

By contrast, the statutory provisions requiring applicants for AFDC payments and food stamps to provide social security numbers to their state welfare agencies do not permit exemptions for any reason. Moreover, the increas-

---

[18] Interestingly, the district court did not explicitly rely on these cases or any other decision of this Court in support of its holding that the government's interest in enforcing the SSN requirement was outweighed by Roy's interest in the free exercise of his religious beliefs.

[19] Thus, the provisions of the South Carolina Unemployment Compensation Act at issue in *Sherbert* provided that employees were ineligible for benefits only if they "'[have] failed, *without good cause*'" to apply for, accept, or return to work. 374 U.S. at 400 n.3 (emphasis added). Similarly, in *Thomas*, the statute provided that an individual was ineligible for benefits if he "voluntarily left his employment *without good cause*." 450 U.S. at 710 n.1 (emphasis added).

ing importance that Congress attaches to the SSN requirement cannot be doubted. For example, the use of SSNs in the Food Stamp program was optional with the states until 1981 (see 7 U.S.C. (Supp. IV 1980) 2025(f)); in that year, Congress changed the pertinent statutory language from "may" (*ibid.*) to "shall" (7 U.S.C. 2025(e)). More recently, Congress expanded the number of programs to which the mandatory SSN requirement applies. See note 1, *supra*. It did so on the recommendation of the Grace Commission, which reported that computer matching employing SSNs "is the Federal Government's most cost-effective tool for verification or investigation in the prevention and detection of fraud, waste and abuse." 7 The President's Private Sector Survey on Cost Control, *Management Office Selected Issues, Information Gap in the Federal Government* 90 (1984); see also *id.* at 82-92; 7 The President's Private Sector Survey on Cost Control, *Report on Federal Feeding* 46-55 (1984). Accordingly, Congress has determined that the compelling governmental interest in verifying program eligibility and preventing welfare fraud cannot be reconciled with the granting of exemptions. That Congress might have written the statutes differently, to permit individually-determined exemptions, is irrelevant. See *United States* v. *Lee*, 455 U.S. at 260-261;[15] *Braunfeld* v. *Brown*, 366 U.S. at 606.[16] The district court erred in

---

[15] In *Lee*, the Court noted that Congress had permitted an exception from the social security tax for self-employed Amish. 26 U.S.C. 1402(g). The Court declined to extend a similar exemption to Amish employers on constitutional grounds, reasoning that "Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system." 455 U.S. at 260.

[16] The Orthodox Jewish merchants in *Braunfeld* objected to the fact that the Sunday-closing law there at issue did not permit exemptions for religious reasons. The Court noted that "[a] number of States provide such an exemption, and this may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation but with its constitutional limitation." 366 U.S. at 608 (footnote omitted). In the present case, given the importance of having a nationally uniform method of identifying recipients of AFDC and food stamps, one might well question whether it would even be wise for Congress to provide exceptions. In any event, exceptions are not constitutionally required.

ignoring the legislative judgment in this regard and engrafting onto the statutes an unfounded exemption that cannot be reconciled with the underlying legislative purposes.

2. The district court's injunction is in any event overbroad. The court cited no legal basis to justify enjoining Secretary Heckler from "using or disseminating" Little Bird of the Snow's SSN and directing her to demand that all other entities, governmental and private, cease using Little Bird of the Snow's SSN. The Free Exercise Clause, even under the most expansive interpretation, only prohibits government from compelling an individual to think or act contrary to his religious beliefs; no decision of this Court holds that the Clause protects an individual against having his religious sensibilities offended by observing actions of government to which he objects. Cf. *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). Were the rule otherwise, those professing religious objections to the conduct of war or to the manner in which government spends tax dollars could assert a Free Exercise Clause violation based on nothing more than their observation of governmental action that they find offensive on religious grounds. This is simply not the law, and the district court's contrary ruling cannot be sustained.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
KATHRYN A. OBERLY
Assistant to the Solicitor General
LEONARD SCHAITMAN
PETER R. MAIER
Attorneys

NOVEMBER 1984

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 83-1179
Complaint Filed 9/17/83
(Judge Muir)

STEPHEN J. ROY AND KAREN MILLER, PLAINTIFFS

v.

WALTER COHEN, ET AL., DEFENDANTS

[June 22, 1984]

OPINION

MUIR, District Judge.

I. INTRODUCTION.

Stephen J. Roy and Karen Miller refuse to use a social security number for their three-year-old daughter, Little Bird of the Snow, on the ground that doing so would be contrary to their native Abenaki Indian religious beliefs. As a result, the Defendants have terminated cash assistance and medical assistance benefits for Little Bird of the Snow payable to the Plaintiffs. They have also initiated proceedings to discontinue food stamps for Little Bird of the Snow. In this lawsuit, the Plaintiffs assert that the Defendants' refusal to provide them welfare benefits to which they would be entitled but for their failure to use a social security number for Little Bird of the Snow constitutes a violation of their right to free exercise of their religion under the first amendment to the United States Constitution. Defendant Margaret Heckler is the Secretary of the United States Department of Health and Human Services (HHS). Defendant John Block is the Secretary of the United States Department of Agriculture (USDA). Defendant Walter

Cohen is the Secretary of the Pennsylvania Department of Public Welfare (DPW). This case was tried by the Court sitting without a jury from May 17 through May 22, 1984. The following are the Court's findings of fact, discussion, and conclusions of law.

II. FINDINGS OF FACT.

1. Plaintiff Stephen J. Roy is an Abenaki Indian.

2. Mr. Roy's great-grandfather on his father's side was a tribal chief in the Abenaki tribe.

3. Mr. Roy's grandfather on his father's side was a full blooded Native American Abenaki.

4. Mr. Roy is registered as a Native American Indian with the Three Rivers Council.

5. Karen Miller is the wife of Stephen J. Roy.

6. Defendant Walter Cohen is Secretary of the Pennsylvania Department of Public Welfare ("DPW").

7. As Secretary of the Pennsylvania Department of Public Welfare, Defendant Cohen has overall responsibility for administration in Pennsylvania of the federal-state programs of Aid to Families with Dependent Children, 42 U.S.C. § 601, *et seq.*, Medical Assistance to families with dependent children, 42 U.S.C. § 1396 *et seq.*, and food stamps to low-income households, 7 U.S.C. § 2011, *et seq.*

8. Defendant Margaret Heckler is Secretary of the United States Department of Health and Human Services ("HHS").

9. As Secretary of HHS, Defendant Heckler has overall responsibility for administration of the federal-state programs of Aid to Families with Dependent Children and Medical Assistance to families with dependent children.

10. Defendant John Block is the Secretary of the United States Department of Agriculture ("USDA").

11. As Secretary of the U.S. Department of Agriculture, Defendant Block has overall responsibility for administration of the federal-state program of Food Stamps to low-income households.

12. In 7 U.S.C. § 2025(e) and 42 U.S.C. § 602(a)(38), Congress has specified that households participating in the federal food stamp program and the Aid to Families with

Dependent Children program furnish the Social Security Number ("SSN") of each member of the household.

13. Applicable regulations of both HHS and USDA (7 C.F.R. § 273.6; 42 C.F.R. § 232.10) reiterate that requirement which has been followed by the Commonwealth of Pennsylvania Department of Public Welfare.

14. Stephen J. Roy and Karen Miller have two children, Renee, age five, and Little Bird of the Snow, age three.

15. The Plaintiffs adhere to Native American tradition and culture and the religious beliefs embodied in that tradition and culture.

16. The Plaintiffs observe several cultural practices which have their foundation in Native American belief.

17. The marriage of Karen Miller and Stephen J. Roy was accomplished in accordance with Native American custom.

18. Mr. Roy and Ms. Miller are raising their children in accordance with Native American tradition and religious beliefs.

19. Renee and Little Bird of the Snow Roy are enrolled on a Native reservation.

20. Little Bird of the Snow was so named during a traditional Indian ceremony performed by Roy and his elder daughter Renee after the birth of Little Bird of the Snow. In this ceremony, Roy and Renee buried Little Bird of the Snow's placenta (so that her "spirit could take root"), said a prayer over it, and named Little Bird of the Snow upon seeing a "sign"—a small goshawk that appeared to emerge from the snow.

21. Little Bird of the Snow Roy was born at the Williamsport Hospital, Williamsport, Pennsylvania on December 28, 1990.

22. Shortly after the birth of Little Bird of the Snow, her mother, Karen Miller, signed an application for a social security number for Little Bird of the Snow which was then submitted to the Social Security Administration by personnel at the hospital. Miller signed the application without Steven Roy's knowledge.

23. Following receipt of the application, the Social Security Administration established a social security number for

Little Bird of the Snow and mailed a social security card for Little Bird of the Snow to Plaintiffs Roy and Miller.

24. When Roy received the social security card for Little Bird of the Snow, he questioned Karen Miller about it and Miller stated that she did not recall signing the application form. Roy and Miller then agreed to and did return the social security card to the Social Security Administration. Roy requested that the Social Security Administration "revoke" the social security number established for Little Bird of the Snow. He was advised that Little Bird of the Snow's social security number would remain "dormant."

25. Little Bird of the Snow's social security number has been provided by the Social Security Administration to the Internal Revenue Service and has been entered in the Social Security Administration's earnings file.

26. To date, no use has been made of Little Bird of the Snow's social security number.

27. Plaintiff Roy sincerely believes that the government's use of the social security number established for Little Bird of the Snow will "rob the spirit" of Little Bird of the Snow and will prevent him from fully "preparing her for greater power."

28. Plaintiff Roy sincerely believes that a social security number is part of a "great evil" as contained in Native American legend.

29. Roy's view is that the great evil—"as described in the legend of Katahdin"—results from the merging together of three different but related evils. One of these evils is the widespread use of computers. Another of these evils is people's casual acceptance of the widespread use of computers. The third evil is the proliferation of weaponry which increasingly employs computer technology, thereby making the use of the weapons to kill people a "sterile" act.

30. Abenaki religious tradition holds that control over one's life is essential to spiritual purity and indispensable to "becoming a holy person."

31. Roy sincerely believes that the decision of whether or not to use a social security number for Little Bird of the Snow must be made by Little Bird of the Snow.

32. Mr. Roy's objection to the use of a Social Security Number for Little Bird of the Snow is consistent with and supported by the religious teachings of Native Americans in general.

33. Roy believes that the establishment of a social security number for Little Bird of the Snow, without more, has not "robbed her spirit," but widespread use of the social security number by the federal or state governments in their computer systems would have that effect.

34. On January 1, 1982, Stephen J. Roy began receiving cash assistance and medical assistance for himself and his two daughters, Renee and Little Bird of the Snow. This assistance was provided by DPW and HHS pursuant to the federal-state programs of Aid to Families with Dependent Children and Medical Assistance to Families with Dependent Children.

35. On April 27, 1982, DPW personnel advised Mr. Roy that he had failed to provide a social security number for Little Bird of the Snow.

36. DPW personnel stated that a social security number is required by federal and state statutes and regulations as a condition of eligibility for assistance for Little Bird of the Snow.

37. Mr. Roy offered to cooperate in finding an alternative to obtaining a social security number for Little Bird of the Snow in order to restore her welfare benefits.

38. DPW personnel refused to consider any alternatives to requiring a social security number for Little Bird of the Snow.

39. Mr. Roy refused to furnish a social security number for Little Bird of the Snow on the ground that doing so would be contrary to his religious belief.

40. On September 17, 1982, Mr. Roy's cash assistance under Aid to Families with Dependent Children was reduced because DPW held Little Bird of the Snow to be ineligible for benefits. Similarly, DPW discontinued medical assistance for Little Bird of the Snow. The sole basis for these actions was Mr. Roy's refusal to furnish a social security number for Little Bird of the Snow.

41. On June 16, 1983, DPW held a hearing on Mr. Roy's appeal from the reduction of cash assistance and discontinuance of medical assistance for Little Bird of the Snow.

42. On July 28, 1983, the DPW Hearing Examiner held that Mr. Roy's refusal to provide a social security number for Little Bird of the Snow was based upon a religious belief which is sincerely held but ordered Mr. Roy's appeal denied and refused to restore the cash assistance or medical assistance for Little Bird of the Snow.

43. DPW affirmed the order of the Hearing Examiner on July 29, 1983.

44. Except for his refusal to provide a social security number for Little Bird of the Snow, Mr. Roy has met all the requirements for eligibility for cash assistance and medical assistance for Little Bird of the Snow at all times since January 1, 1982.

45. Mr. Roy and Ms. Miller continue to refuse to furnish a social security number for Little Bird of the Snow.

46. In September, 1982, Mr. Roy was denied $33 and since October, 1982, Mr. Roy has been denied $66.00 per month as a result of DPW's discontinuance of Little Bird of the Snow from cash assistance.

47. Since September 17, 1982, Mr. Roy has paid $40.50 for medical and dental care for Little Bird of the Snow.

48. If DPW had not discontinued Little Bird of the Snow from medical assistance, these expenses would have been paid by DPW and HHS.

49. Stephen J. Roy and Karen Miller have been receiving Food Stamps from DPW and USDA pursuant to the federal-state program of Food Stamps to low-income households.

50. On or about May 26, 1983, DPW advised Mr. Roy and Ms. Miller that it intends to discontinue food stamps for Little Bird of the Snow because they failed to furnish a social security number for Little Bird of the Snow. DPW personnel asserted that a social security number is required by federal and state statutes and regulations as a condition of eligibility for food stamps for Little Bird of the Snow.

51. Except for their refusal to provide a social security number for Little Bird of the Snow, Mr. Roy and Ms.

Miller meet all the requirements for eligibility for Food Stamps for Little Bird of the Snow.

52. Mr. Roy and Ms. Miller are required to provide their social security numbers as a condition of receiving food stamps for Little Bird of the Snow.

53. Mr. Roy and Ms. Miller provided their own social security numbers when they applied for food stamps for Little Bird of the Snow.

54. Mr. Roy's continued refusal to furnish a social security number for Little Bird of the Snow is based upon sincerely held Abenaki religious beliefs.

55. The government requires a social security number as a condition of receiving welfare benefits in order to prevent fraud.

56. The social security number is an important tool of federal and state agencies to reduce the misdirection of benefits in the food stamp and AFDC programs.

57. Analyses done by HHS and USDA confirm that there exist significant fraud and overpayments in these benefits programs.

58. The error rate for incorrect payments in the AFDC and Food Stamps programs is currently between five and ten percent.

59. Studies by HHS indicate overpayments of $225,000,000 on an annual basis while USDA has estimated that, in fiscal year 1981, $1,000,000 in benefits were attributable to payments to persons ineligible for the program and overpayments to eligible persons.

60. The efficient operation of these programs requires the use of computer systems that utilize unique numerical indentifiers such as the social security number.

61. The social security number has become a very important part of the efforts of states to administer their welfare programs effectively through computerized record systems.

62. Such systems ensure greater accuracy in providing benefits and in reducing fraud in such programs and aid in the coordination of information in various welfare programs to ensure that recipients are not receiving duplicate benefits.

63. Social security numbers are used in making the determination that benefits in the programs are properly paid and that there is no duplication of benefits or failure of payment.

64. Utilization in the computer system of the name of a benefit recipient alone frequently is not sufficient to ensure the proper payment of benefits.

65. Social security numbers provide a basis for differentiating among program recipients with the same or similar names.

66. Social security numbers serve this purpose well because they are unique identifiers.

67. The Social Security system has data on over 393,000,000 accounts.

68. As of October 11, 1983, the computer system had a record of 55,036 persons with the surname Roy and of 32 persons with the name Stephen Roy.

69. The use of computer "cross-matching" can significantly reduce erroneous payments in these programs.

70. Social security numbers are very useful for program cross-matching.

71. Requiring social security numbers for children enhances the agencies' ability to detect non-existent children on the basis of cross-matches with school enrollment and other files.

72. Social security numbers also are helpful in carrying out the WIN (work incentive) and Child Support programs and the work registration and workfare provisions of the food stamp programs.

73. A demonstration of eligibility for food stamps can affect a household's eligibility for benefits in six other nationwide meal programs administered by USDA.

74. Without the provision of social security numbers in these programs, cross-matching would be more difficult to perform.

75. The file on a particular benefit recipient can be identified, and cross-matching performed, if the benefit recipient's full name, date of birth, and parents' names are entered into the computerized systems.

76. Certain computer systems used by the Defendants also allow for the entry of additional information to identify a particular benefit recipient, including the benefit recipient's parents' social security numbers and the recipient's place of birth.

77. The government's interest in preventing Little Bird of the Snow from fraudulently receiving welfare benefits can be satisfied without requiring a social security number for Little Bird of the Snow.

78. Mr. Roy was and is required to provide his own social security number as a condition for receiving the cash grant and medical assistance for Little Bird of the Snow.

79. Mr. Roy agreed to provide his own social security number when he applied for the cash grant and medical assistance for Little Bird of the Snow.

80. Little Bird of the Snow's name and birthdate were entered into the computers which DPW, HHS and USDA use to determine eligibility for welfare benefits.

81. There are no other persons named Little Bird of the Snow Roy or Little Bird of the Snow whose names are in the computer which DPW uses to determine eligibility for welfare benefits.

82. Even if there were other persons in the computer who share her name, information on Little Bird of the Snow could be rapidly located in most if not all of the existing computer systems by searches or comparisons of birthdates and parents' names and addresses.

83. There have been four reported cases involving challenges to the social security number requirement for welfare benefits based upon the contention that the number violates sincerely held religious beliefs of the welfare recipient.

84. Exempting Little Bird of the Snow from the social security number requirement would require no modifications to the Defendants' computer systems, would require at the most some minor extra expenditure of time by the Defendants' employees and would require no discrete financial expenditure.

88. The Defendants' interest in maintaining an efficient and fraud resistant system can be met without requiring use of a social security number for Little Bird of the Snow.

86. As a result of the Defendants' denial of benefits to Little Bird of the Snow, the Plaintiffs and their children have been living at a near-subsistence level.

III. DISCUSSION.

Little Bird of the Snow received her name in a traditional Native American Indian ceremony performed by Plaintiff Roy after the birth of Little Bird of the Snow. In this ceremony, Roy and his elder daughter Renee buried Little Bird of the Snow's placenta (so that her "spirit could take root"), said a prayer over it, and named Little Bird of the Snow upon seeing a "sign"—a small goshawk that appeared to emerge from the snow. Plaintiff Roy believes that Little Bird of the Snow's name is sacred. He also believes that government use of a social security number for Little Bird of the Snow will "rob her spirit."

Upon consideration of the parties' arguments and the evidence presented at trial, we reach the following conclusions. First, this case is not moot as claimed by the Defendants. Second, Roy's objection to use of a social security number for Little Bird of the Snow derives from sincerely held religious beliefs. Third, while the government's interest in requiring individuals to use a social security number is great, that interest is "outweighed" by Roy's rights under the first amendment. Stated otherwise, the governmental interests served by the social security number requirement will not be significantly compromised by exempting Little Bird of the Snow from the requirement in this case.

A. Mootness.

Prior to trial, the parties agreed that Little Bird of the Snow did not have a social security number. *See* Comprehensive Statement of Undisputed Facts (filed May 7, 1984) ¶ 6. On the last day of the trial of this case, however, one of the Defendants' witnesses, an official of the Social Security Administration, determined that Little Bird of the Snow has a social security number. Following this somewhat sur-

prising discovery, the Defendants argued that this case is moot and this Court therefore has no jurisdiction to address the Plaintiffs' claims.

The Defendants contended that the case is moot because the Plaintiffs sought in this suit to avoid the requirement that they provide a social security number for Little Bird of the Snow as a condition of receiving welfare benefits for her but, because a social security number for Little Bird of the Snow already exists, the Plaintiffs can no longer legitimately claim any objection to providing the social security number in order to receive welfare benefits.

The Defendants' argument mischaracterizes the nature of the Plaintiffs' claim. Roy believes that an individual's use of a social security number in modern American society "robs" that individual's spirit and deprives him to some extent of the ability to attain "greater power." He believes that once an individual's social security number is used, the spirit of that individual is robbed and the damage to the individual cannot be undone. Roy testified that he used his social security number before he "became aware"—developed his beliefs—and, as a result, his spirit has been robbed and it would be pointless for him now to object to use of his social security number. Indeed, Roy provides his social security number to the Defendants in connection with his receipt of welfare benefits, as does Plaintiff Karen Miller. The Plaintiffs also provide their daughter Renee's social security number to the Defendants in order to receive welfare benefits for Renee.

Notwithstanding the above, Roy sincerely believes that the spirit of Little Bird of the Snow has not been robbed by the mere establishment of a social security number for her. He further believes that no substantial harm will befall Little Bird of the Snow until her social security number is "used". Likewise, while Roy would prefer that no social security number had ever been established for Little Bird of the Snow, he still feels compelled by his religious belief to avoid any use of that number and, to that end, has refused to provide the number to the Defendants in order to receive welfare benefits for Little Bird of the Snow. The Plaintiffs desire to obtain welfare benefits without the government

using Little Bird of the Snow's social security number in connection with any information maintained by the government regarding Little Bird of the Snow. The Plaintiffs also seek to have Little Bird of the Snow's social security number "expunged" to whatever extent that is possible.

In light of the foregoing, we reject the Defendants' argument that this case is moot.

On June 15, 1994, the federal defendants and Defendant Cohen filed post-trial motions to dismiss this case in which they reiterate their argument that this case is moot and make the related argument that the Plaintiffs are not entitled to injunctive relief because they misrepresented a material fact and therefore have "unclean hands." The Defendants maintain that the Plaintiffs represented that Little Bird of the Snow has no social security number whereas, in fact, she does. We reject this argument for several reasons. The fact that Little Bird of the Snow was assigned a social security number is not material for the same reason that this case is not moot. Plaintiff Roy does not in this lawsuit object to the establishment of a social security number for Little Bird of the Snow but he does object to extensive governmental use of that number and to the requirement that he provide the number to the Defendants in order to obtain benefits for Little Bird of the Snow. Neither the Plaintiffs' complaint nor their statement of material facts submitted with their summary judgment motion states that no social security number has been established for Little Bird of the Snow. Likewise, both the complaint and the statement of material facts make it clear that the Plaintiffs object to providing a social security number for Little Bird of the Snow in order to obtain benefits for her.

The Defendants also point out that the plaintiffs agreed to the "undisputed fact" that Little Bird of the Snow has no social security number. The federal Defendants are equally responsible if not more responsible for this misstatement. The Defendants agreed to the facts contained in the parties' Comprehensive Statement of Undisputed Facts. The federal Defendants had the ability to confirm or deny the "fact" that Little Bird of the Snow had no social security number and they did not do so until the last day of the trial

of this case. It is incredible that the federal Defendants failed to make a simple and quick check of their records to ascertain the existence of the number.

B. Roy's "Religious" Belief.

The Defendants argue that the plaintiffs' objection to the social security number requirement does not derive from any "religious" belief and therefore is not entitled to First Amendment protection. *See United States v. Seeger*, 380 U.S. 163 (1965). The Defendants argue that, although Plaintiff Roy claims that his beliefs derive from his Abenaki Indian background, many of his beliefs are not purely Abenaki beliefs and therefore cannot properly be characterized as religious. For example, the Plaintiffs' expert, Professor Driscoll, testified that many of Roy's beliefs and practices are common to many Native American Indian tribes. We fail to see how the fact that a belief is common to many Native American tribes changes the fact that the belief is an Abenaki religious belief.

The Defendants also argue that the plaintiffs' objection is philosophical rather than religious in nature. The Defendants point out that many individuals object to the widespread use of identifying numbers and that their objections are characterized as philosophical. Nevertheless, Roy traced his objection to the social security number requirement directly to the legend of "Katahdin" which clearly is a part of Native American Indian tradition or "religion." Roy and his expert also testified that Native American Indians do not make a distinction between religion, culture, and what most Americans call "philosophy."

The Defendants also claim that the Plaintiffs' objection to the social security number requirement is not truly religious because it is, for various reasons, irrational. A belief need not be rational in order to be a religious belief entitled to first amendment protection. Thomas vs. Review Board of the Indian Employment Security Division, 450 U.S. 707 (1981). Roy's beliefs are not any more irrational than most religious beliefs. Moreover, after hearing Roy's testimony regarding his objection to the use of the social security number and the beliefs from which that objection derives

followed by the testimony presented by the Defendants' regarding their use of the social security number and extensive reliance on computer technology, we are not convinced that Roy's beliefs are, in fact, irrational. For all of the foregoing reasons, we conclude that the Plaintiffs' objection to use of a social security number for Little Bird of the Snow derives from beliefs that are properly characterized as "religious."

C. The Plaintiffs' Sincerity.

We are persuaded that Plaintiff Roy sincerely holds the religious beliefs that underlie his objection to the social security number requirement. This conclusion is based primarily on our determination that Roy's testimony that he sincerely holds his beliefs is credible. Moreover, Roy testified to numerous objective manifestations of the sincerity of his beliefs including the ceremony in which Little Bird of the Snow was given her name and the Plaintiffs' efforts to raise their children in accordance with Native American Indian tradition. Finally, the fact that Roy has foregone $66.00 per month in cash assistance for Little Bird of the Snow since October 1982, as well as other benefits despite the fact that the Plaintiffs have very little income strongly suggests that they are sincere in their religious beliefs.

The Defendants point to the fact that Roy is not completely "consistent" in his religious practices. Assuming this to be true, it does not change the fact that Roy sincerely holds the religious beliefs that give rise to his objection to the social security number. Roy lives in a modern society with which American Indian tradition is, in many respects, at odds. He does not reject the modern society in which he lives as the Defendants apparently would have him do in order to be entitled to first amendment protection. Roy does attempt to live in this society while maintaining his traditional religious beliefs and practices and he apparently does so with considerable success.

With regard to Plaintiff Karen Miller, because she did not testify at the trial of this case, we are unable to determine whether she sincerely holds religious beliefs identical

or similar to those held by Mr. Roy. Plaintiff Miller does not claim that she has been denied cash assistance for Little Bird of the Snow but she contests Defendants Block and Cohen's threatened termination of food stamps for Little Bird of the Snow. We are hesitant to grant Miller injunctive relief against the threatened termination of food stamps in light of her failure to testify at trial. Nevertheless, it would be inequitable to hold that Plaintiff Roy need not provide a social security number for Little Bird of the Snow while allowing the government to require Miller to provide a social security number for Little Bird of the Snow, thereby effectively denying Roy the relief he seeks. In other words, because Roy and Miller jointly receive food stamps for Little Bird of the Snow, we think that proof that Roy has a sincere religious objection to providing a social security number for Little Bird of the Snow supports an injunction against Defendants Block and Cohen from terminating food stamps for Little Bird of the Snow to the same extent as would a finding that both Plaintiffs hold sincere religious objections to the requirement.

D. The Government's Interest.

There is no question that the government's interest in utilizing computer systems in connection with the payment of welfare benefits is substantial. Likewise, the government's interest in requiring that benefit recipients provide a social security number in order to facilitate accurate and efficient identification of those recipients is substantial. *See* Callahan vs. Woods, slip op. at 9-10, No. 83-1589 (9th Cir. March 30, 1984). Use of the social security number in connection with the various welfare programs enhances the programs' efficiency and helps to reduce the tremendous problem of misspayment of benefits by the agencies involved.

E. Resolution of the Conflict Between the Parties' Interests.

1. The Appropriate Test.

The parties dispute the standard by which this Court is to determine whether the Plaintiffs' interest in acting in accordance with their religious beliefs by refusing to provide

a social security number in order to receive welfare benefits is superior to the government's interest in requiring all welfare benefit recipients to provide a social security number. In our May 15, 1984, opinion on the parties' summary judgment motions, we relied primarily on the decision of the Court of Appeals for the Ninth Circuit in Callahan vs. Woods, No. 80-1689 (March 30, 1984) in which the Court of Appeals employed the "compelling state interest—least restrictive alternative" test. The Defendants maintain that the standard that should be used in deciding this case is not the compelling interest—least restrictive alternative test, but a "weighing" or "balancing" test. The parties also dispute just what interests are to be considered in determining the outcome of the case.

The Plaintiffs advocate strict adherence to the least restrictive alternative test. In other words, unless the government can show that its interests cannot be served by any means less restrictive of the Plaintiffs' first amendment rights, the Plaintiffs should prevail. We reject this analysis because we do not believe that the Plaintiffs should prevail if some "less restrictive alternative" is available to the government that would involve an unreasonable cost. In our May 15, 1984, opinion we held that the Plaintiffs could prevail on their free exercise claim only if they could show that the governmental interests served by the social security number requirement could be served by some reasonable alternative means which would not burden the Plaintiffs' first amendment rights. In other words, if holding that the Plaintiffs' objection to the social security number requirement entitles them to an exemption from the requirement would substantially burden the benefit programs involved in this case by, for example, involving a cost so great that the efficient operation of the programs would be affected or by creating a substantial likelihood of chaos in the system resulting from a proliferation of claims to exemptions from the requirement, then the governments' interest should be held superior to the Plaintiffs' right to exercise their religious beliefs.

The Defendants argue that so long as the government's interest in maintaining the social security number require-

ment is "weighty" enough, the Defendants must prevail. The Defendants argue that the government's general interest in maintaining the social security number requirement is all that need be considered and the government's interest in maintaining the requirement in this particular case is, in effect, not relevant. Likewise, the Defendants maintain that the government should prevail in this case because it has a substantial interest in uniform enforcement of the social security number requirement and that granting an exception to the requirement in this case will adversely impact the government's substantial interest in maintaining uniformity. We reject this argument as well because it would effectively guarantee victory for the government in every case. It is obvious that the government has a strong interest in uniform enforcement of all laws and regulations. The analysis advocated by the Defendants is inconsistent with the First Amendment's requirement that exceptions to an otherwise uniformly enforced law be made in those exceptional cases where the law conflicts with an individual's sincerely held religious beliefs. See Callahan vs. Woods, slip op. at 5-6, No. 83-1668 (9th Cir. March 30, 1984).

The Defendants rely on the case of U.S. vs. Lee, 455 U.S. 252 (1982) in support of their argument that the Plaintiffs' claim in this case must fail because it would adversely impact the government's interest in uniform enforcement of the social security number requirement. In *Lee*, the Supreme Court held that a member of the Amish faith was not entitled to an exemption from the requirement that he pay social security taxes required of employers on the basis that payment of those taxes was contrary to his sincerely held religious beliefs. *Lee* is distinguishable from this case in at least two respects. First, the harm to the government that would have resulted from Lee's non-payment of social security taxes would have been immediate in that the funds available for payment of benefits by the Social Security Administration would be reduced whereas in this case any harm to the government resulting from Plaintiffs not providing a social security number for Little Bird of the Snow is, as will be discussed shortly, speculative only. Also, the

Court in *Lee* apparently relied upon the apparent possibility of a tremendous number of claims of religious based objection to payment of taxes creating chaos in the tax system. In this case, as will be discussed below, the Defendants have not shown that there is any likelihood that more than a handful of individuals object on the basis of sincerely held religious beliefs to the social security number requirement challenged in this case. Finally, Justice Stevens suggests in a concurring opinion in *Lee* that the unarticulated standard used to decide that case actually imposes an almost insurmountable burden on a plaintiff in a free exercise case but that such a standard has not been applied in those cases involving a "law intended to provide a benefit to a limited class of otherwise disadvantaged persons," such as laws providing for unemployment compensation. *Lee*, 455 U.S. at ____ n.2. Such is the situation in this case.

2. Application of the Test to this Case.

In light of the foregoing, we will consider this case under the reasonable less restrictive alternative standard articulated in our opinion on the parties' motion for summary judgment and explicated in this opinion. Under that standard, we will consider the Plaintiffs' interests as against the government's interest in this particular case as well as the government's interest in the social security number requirement as a general matter.

As noted above, the government's general interest in maintaining the social security number requirement is great. However, that interest does not appear to be threatened by the claim presented in this case because the Plaintiffs' claim appears to be extremely unusual. We are not aware of more than four reported challenges to the social security number requirement. The Defendants presented no evidence that requests for exemption from the requirement have been made by persons other than those involved in the four reported cases. The Defendants have presented no evidence that any more than a handful of people have religious beliefs that would result in a request for an exemption from the social security number requirement. Thus, the Government's general interest in enforcement of the so-

cial security number requirement would not appear to be threatened by a holding in favor of the Plaintiffs in this case. We note also that even though virtually all benefit recipients provide their social security numbers to the Defendants, five to ten percent of all payments made under the benefit programs are made in error. As discussed above, we reject the government's argument that the Plaintiffs cannot prevail because the grant of any exception to the social security number requirement is impermissible.

The government's interest in avoiding a grant of an exemption to the social security number requirement to the Plaintiffs in this case is very small. As appears from our findings, the Defendants did not produce any evidence that the grant of such an exemption will require any discrete expenditure of funds or substantial commitment of personnel time. Indeed, the Defendants never pointed out any specific concrete harm that would result if the Plaintiffs prevailed in this case. The testimony presented by the Defendants' witnesses on this question was vague. The Defendants failed to present any evidence regarding the costs incurred or problems encountered by the government following Judge Weinstein's decision in Stephens vs. Berger, 428 F.Supp. 896 (E.D. N.Y. 1977) in which he ordered the government to pay welfare benefits to the Plaintiffs in that case despite their refusal to provide social security numbers. The Defendants also presented no evidence that any harm had resulted from the Defendants' provision of benefits for Little Bird of the Snow in 1982 when the Plaintiffs provided no social security number for her.

It appears to the Court that the harm that the Government might suffer if the Plaintiffs prevailed in this case would be, at worst, that one or perhaps a few individuals could fraudulently obtain welfare benefits. Such a result would obtain only if (1) Little Bird of the Snow attempted fraudulently to obtain welfare benefits or someone else attempted fraudulently to obtain such benefits using Little Bird of the Snow's name and (2) identification procedures available to the Defendants that do not require utilization of a social security number failed to expose the fraud. This possibility appears to the Court to be remote.

The government witnesses contend that the social security number requirement is essential because the social security number is relied upon in comparing files of welfare recipients through computer "cross-matching" programs. These witnesses did not testify, however, that cross-matching could not be performed (and welfare fraud thereby discovered and deterred) without the use of the social security number except in one unusual situation discussed below. Rather, these witnesses testified that cross-matching could be performed but any match between files identified by the computer would be accorded less "weight" than a match involving two files containing identical social security numbers. In other words, if the computer discovered two applications for welfare benefits by an individual with a certain name, absent a social security number or some other identifier, a match would be obtained but would not definitively establish that one applicant is the same as the other, i.e., that fraud was involved. If this problem arises, the government might be faced with a need to perform additional clerical work in order to determine whether the two applicants are indeed the same.

Contrary to the government's implication, the social security number is not essential to avoid the problem alluded to in the preceding paragraph. An applicant for benefits under the programs involved in this case is required to submit not only his name and his social security number but several other identifying factors such as date of birth. Effective cross-matching can be performed on the computer systems currently used by the Defendants when several identifying factors for a particular applicant are typed into the computer, even absent the social security number. Moreover, in this particular case, the Defendants presented no evidence that there was anybody else in the United States with the name Little Bird of the Snow or that any person using the name Little Bird of the Snow (other than Little Bird of the Snow Roy) has applied for welfare benefits.

The only instance of which we are aware in which an individual's failure to provide a social security number might render cross-matching impossible is in the interstate con-

text. Witnesses for the Defendants testified that this is so because different states use different formats for entering people's names into their computer system whereas the social security number is used nationwide and is always a nine digit number. We are not persuaded that cross-matching would be impossible in the interstate context without the social security number. In any event, assuming that such cross-matching is impossible, the possibility that Little Bird of the Snow or some other individual could fraudulently obtain welfare benefits in two different states or in some other interstate context as a result of exempting Little Bird of the Snow from the social security number requirement in this case is extremely remote.

For all of the foregoing reasons, we conclude that the Plaintiffs' objection to use of a social security number for Little Bird of the Snow is protected under the first amendment such that the Plaintiffs are entitled to an exemption from the social security number requirement.

F. Relief.

The Plaintiffs seek the following relief. First, they seek an order requiring Defendant Cohen or Defendant Heckler or both to pay to the Plaintiffs the benefits withheld from the Plaintiffs in violation of their first amendment rights. Second, they seek an order enjoining all of the Defendants from denying benefits to the Plaintiffs for Little Bird of the Snow for failure to provide a social security number. Third, they seek an award of damages against Defendants Cohen and Heckler, in their individual capacities, for injuries caused as a result of their infringement of the Plaintiffs' constitutional rights. Fourth, they seek an order requiring Defendant Heckler in effect to eliminate any reference to or use of the social security number previously established for Little Bird of the Snow. Finally, they seek an award of costs and attorney's fees.

We will grant the Plaintiffs part of the injunctive relief they seek. We will enjoin the defendants from denying benefits to the Plaintiffs for Little Bird of the Snow because of the Plaintiffs' failure to provide a social security number for Little Bird of the Snow. Because the Plaintiffs have se-

serted that they have no present religious objection to the mere past establishment of a social security number for Little Bird of the Snow, we will deny their request that that number be "eliminated".

We will also enjoin Defendant Heckler from using or disseminating the social security number already established for Little Bird of the Snow. We recognize that Defendant Heckler has already provided the number to the Internal Revenue Service and that that single instance of dissemination of the number cannot be undone by any order in this case. Nevertheless, Roy objects to widespread governmental use of the number which, according to Roy's testimony, has not yet occurred.

The Plaintiffs request that any injunction(s) granted them by the Court not be limited in time. Alternatively, in response to the Defendants' concern that the Government's interest in requiring Little Bird of the Snow to use a social security number will be far greater when Little Bird of the Snow reaches age 16 than at present, the Plaintiffs request that any injunctions extend until Little Bird of the Snow's 16th birthday. We will order that the injunction extend only to Little Bird of the Snow's 16th birthday.

With regard to the Plaintiffs' request for damages, we are not aware of any authority for the relief requested by the Plaintiffs. As discussed in our prior opinion in this case, an award of damages against Defendant Cohen is barred by the Eleventh Amendment guarantee of sovereign immunity to the states. *See* Edelman vs. Jordan, 415 U.S. 651 (1974). With regard to an award of damages against Defendant Heckler, we are not persuaded by the authorities cited by the Plaintiffs that we have the authority to grant such an award. Moreover, even assuming that such power exists, it appears that Defendant Heckler is immune from the Plaintiffs' claim for damages because her conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow vs. Fitzgerald, 457 U.S. 800 (1982). Finally, we reject the Plaintiffs' assertion that the Defendants should be held liable in their individual capacities for their action in withholding benefits to the Plaintiffs. The Defendants acted

pursuant to a clearly-expressed statutory requirement and we therefore see no basis for holding them individually liable. Although we have concluded that we lack the power to award to the Plaintiffs the withheld benefits, we reach this conclusion reluctantly in that the Plaintiffs were entitled to and therefore arguably should receive the benefits that were withheld between October 1982 and the present.

We will reserve decision on the Plaintiffs' request for attorney's fees until such time as the Plaintiffs submit a motion for attorney's fees which conforms to the requirements of the Court of Appeals and as set forth in the practice order issued in this case. We express no view as to the merit of such a request.

IV. Conclusions Of Law.

1. The Plaintiffs' refusal to provide a social security number for Little Bird of the Snow is based upon a religious belief.

2. Roy's religious belief is sincerely held.

3. By requiring Roy to violate his religious beliefs as a condition of receiving welfare benefits, the Defendants place a substantial burden upon Roy's free exercise of his religion.

4. The Defendants' interests can be satisfied by reasonable less restrictive means which do not infringe upon Roy's religious beliefs.

5. The Defendants' denial of cash assistance and medical assistance, and threatened denial of food stamps for Little Bird of the Snow violate Roy's rights under the First, Fifth and Fourteenth Amendments to the United States Constitution.

An appropriate order will be entered.

/s/ Muir

MUIR, U.S. District Judge

DATED: JUNE 22, 1984

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 93-1179
Complaint Filed 6/17/93
(Judge Muir)

STEPHEN J. ROY AND KAREN MILLER, PLAINTIFFS

v.

WALTER COHEN, ET AL., DEFENDANTS

(June 22, 1994)

ORDER

1. Defendants Walter Cohen and Margaret Heckler, in their official and individual capacities, their successors, agents and employees and all persons acting in concert with them, are restrained until December 26, 1996 from denying Plaintiff Roy cash assistance and medical assistance benefits for Little Bird of the Snow for the Plaintiffs' failure to provide a social security number for her.

2. Defendants Walter Cohen and John Block, acting in their official and individual capacities, their successors, agents and employees and all persons acting in concert with them, are restrained until December 26, 1996 from refusing to provide food stamps for Little Bird of the Snow for the Plaintiff's failure to provide a social security number for her.

3. Defendant Margaret Heckler, acting in her official and individual capacities, is permanently restrained from making any use of the social security number which was issued in the name of Little Bird of the Snow Roy and from disseminating the number to any agency, individual, business entity or any other third party. Defendant Heckler is ordered to notify any agency, individual, business entity or

other third party to which the number has been provided and demand that said agency permanently refrain from: (1) making any use of the number and (2) disseminating the number to any other agency, person, individual, business entity, or any other third party.

4. The Defendants' June 15, 1984 motions to dismiss this case are denied.

5. The Clerk of Court shall enter judgment for Plaintiffs with respect to their requests that the Defendants be enjoined from refusing to provide benefits for Little Bird of the Snow until her 16th birthday because of the Plaintiffs' refusal to provide a social security number for her and that Defendant Heckler be enjoined from disseminating the number. The Clerk of Court shall enter judgment in favor of the Defendants with respect to all other claims made by the Plaintiffs.

/s/ Muir
MUIR, U.S. District Judge

DATED: June 22, 1984

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DIST. OF PA.

CV. 83-1179
Judge Malcolm Muir

STEPHEN J. ROY AND KAREN MILLER

v.

WALTER COHEN, ET AL.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Judgment is entered in favor of the Plaintiffs Stephen J. Roy and Karen Miller and against Walter Cohen, et al., with respect to their requests that the Defendants be enjoined from refusing to provide benefits for Little Bird of the Snow until her 16th birthday because of the Plaintiffs' refusal to provide a social security number for her and that Defendant Heckler be enjoined from disseminating the number;

That Judgment is entered in favor of the Defendants Walter Cohen, et al., with respect to all other claims made by the Plaintiffs Stephen J. Roy and Karen Miller.

/s/ Donald R. Berry
DONALD R. BERRY,
Clerk

/s/ Sylvia Lehotsky
SYLVIA LEHOTSKY
Deputy Clerk

JUNE 22, 1984

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 83-1179
Complaint Filed 8/17/83
(Judge Muir)

STEPHEN J. ROY AND KAREN MILLER, PLAINTIFFS

v.

WAYNE COHEN, SECRETARY OF THE PA. DEPT. OF PUBLIC WELFARE; ET AL., DEFENDANTS

[May 15, 1984]

OPINION

MUIR, District Judge.

Stephen J. Roy and Karen Miller have refused to obtain a social security number for their two-year-old daughter, Little Bird of the Snow, on the ground that doing so would be contrary to their Native Abenaki Indian religious beliefs. As a result, the Defendants have terminated cash assistance and medical assistance benefits for Little Bird of the Snow payable to the Plaintiffs. They have also initiated proceedings to discontinue food stamps for Little Bird of the Snow. In this lawsuit, the Plaintiffs assert that the Defendants' failure to pay them welfare benefits to which they would be entitled but for their failure to obtain a social security number for Little Bird of the Snow constitutes a violation of their first amendment right to free exercise of their religion. Defendant Walter Cohen is the Secretary of the Pennsylvania Department of Public Welfare (DPW). Defendant Margaret Heckler is the Secretary of the United States Department of Health and Human Services and Defendant John Block is the Secretary of the United States Department of Agriculture. Defendants Heckler and Block will be hereinafter referred to as the federal defendants.

Presently before the Court are motions for summary judgment filed by the Plaintiffs, the federal Defendants, and Defendant Cohen.

The following facts set forth by the Plaintiffs in the "Statement of Material Facts ..." which they filed with their summary judgment motion are not disputed by the Defendants. Plaintiff Roy is a Native Abenaki Indian. Roy and Plaintiff Karen Miller were married in accordance with native Abenaki custom. The Plaintiffs have two children, Renee, age 5, and Little Bird of the Snow, age 2.

Defendant Heckler is responsible for the administration of the Aid to Families with Dependent Children, see 42 U.S.C. §§ 601-615, and Medical Assistance, see 42 U.S.C. § 1396, programs. Defendant Block is responsible for the administration of the food stamps program. See 7 U.S.C. §§ 2011-2027. Both of these programs are jointly administered by the federal and state governments. Defendant Cohen is responsible for the administration in Pennsylvania of these programs. Households participating in the Aid to Families with Dependent Children and food stamp programs are required to furnish social security numbers for each member of the household in order to participate in the programs. 42 U.S.C. § 602(a)(25); 7 U.S.C. § 2025(e).

In January 1982, the Pennsylvania Department of Public Welfare and the Department of Health and Human Services began providing to Plaintiff Roy cash assistance and medical assistance benefits for Roy and his two daughters pursuant to the Aid to Families with Dependent Children and medical assistance programs. In April 1982, the DPW advised Roy that he had failed to provide a social security number for Little Bird of the Snow as required by federal and state law. Mr. Roy refused to provide a social security number for Little Bird of the Snow. He alleges that his refusal is based on his sincerely held native Abenaki religious beliefs. As a result of Roy's refusal to obtain a social security number for Little Bird of the Snow, the DPW reduced the amount of cash assistance to Roy under the AFDC program in September 1982. It also discontinued medical assistance benefits for Little Bird of the Snow.

BEST AVAILABLE COPY

In June 1983, the DFW held a hearing on Roy's appeal from the DFW's reduction of these benefits. The DFW determined that Roy's refusal to provide a social security number for Little Bird of the Snow is based on a sincerely held religious belief but denied his appeal and refused to restore cash or medical assistance benefits for Little Bird of the Snow. As a result of DFW's discontinuance of these benefits, Mr. Roy was denied $33.00 in September 1982 and, since October 1982, Roy has been denied $66.00 per month. Mr. Roy likewise has not received reimbursement for $20.00 in medical expenses for Little Bird of the Snow.

The Plaintiffs have been receiving food stamps from the DFW and the Department of Agriculture. In May 1983, DFW advised the Plaintiffs that it intended to discontinue food stamps for Little Bird of the Snow because of the Plaintiffs' failure to provide a social security number for Little Bird of the Snow.

DISCUSSION

Several Courts have addressed claims virtually identical to the Plaintiffs' claim in this case. See, e.g., Callahan vs. Woods, No. 83-1688 (9th Cir. March 30, 1984); Stevens vs. Berger, 428 F. Supp. 896 (E.D. N.Y. 1977); Mullaney vs. Woods, 150 Cal. Rptr. 902 (1979). Consequently, we discuss only briefly the statutory schemes and legal standards involved in this case.

In order to prevail on their claim that the social security number requirement impermissibly interferes with their first amendment right to free exercise of their religion, the Plaintiffs must show that their refusal to provide a social security number for Little Bird of the Snow is based on a sincerely held belief properly characterized as "religious". United States vs. Seeger, 380 U.S. 163 (1965). The Plaintiffs must also show that the requirement that they obtain a social security number in order to obtain benefits for Little Bird of the Snow substantially interferes with the free exercise of their religious beliefs. Callahan vs. Woods, No. 83-1688, slip op. at 8 (9th Cir. 3/30/84). Assuming that the Plaintiffs can prove the above, the burden then shifts to the Government to prove that the social security number re-

quirement is necessary to promote a compelling governmental interest which cannot reasonably be satisfied by any "less restrictive alternative," *i.e.*, that the interest served by maintaining the social security number requirement cannot be reasonably served by some other means which would not interfere with the Plaintiffs' free exercise of their religious belief. *Id.* at 5-6.

1. Sincerely Held Religious Belief.

In support of their motion for summary judgment on this issue, the Plaintiffs point to the fact that the Pennsylvania Department of Public Welfare found that Mr. Roy's refusal to obtain a social security number for Little Bird of the Snow was based on a sincerely held religious belief. The Plaintiffs also claim that the Defendants have not presented any affidavits or other evidence to rebut the Plaintiffs' claim that they are acting on the basis of a sincerely held religious belief.

Despite the above, we decline to grant summary judgment for the Plaintiffs on this issue. The conclusion of the Pennsylvania Department of Public Welfare is not binding on this Court in this action and is at best only mildly persuasive. While we agree with the Plaintiffs that they have presented substantial evidence tending to establish that their actions are based on a sincerely held religious belief and the Defendants have presented no evidence to contradict that claim, the Court is of the view that this issue may properly be determined only after a hearing.

Our decision that the Plaintiffs are not entitled to summary judgment on the issue of whether their belief is religious and sincerely held forecloses summary judgment for the Plaintiffs on their claim. The Plaintiffs may nevertheless be entitled to summary judgment on the other issues relevant to their claim. We will discuss these issues in the context of the federal Defendants' motion for summary judgment.

In ruling on the federal Defendants' motion for summary judgment, we assume that the Plaintiffs' actions are based on a sincerely held religious belief. The questions that remain are whether the social security number requirement substantially burdens the Plaintiffs' free exercise of their

religious belief, whether the governmental interests promoted by the social security number requirement are "compelling" and whether those governmental interests might be served by some alternative means which would not burden the Plaintiffs' exercise of their first amendment right.

The social security number requirement apparently constitutes a substantial burden on the Plaintiffs' free exercise of religion. Callahan vs. Woods, No. 83-1698, slip op. at 7-8 (9th Cir. 3/30/84). The fact that the burden on the Plaintiffs is "indirect" does not alter this conclusion:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas vs. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 717-18 (1981).

The next issue is whether the social security number requirement furthers a "compelling" governmental interest. The federal Defendants assert that the social security number requirement serves the government's interests in promoting the efficient operation of various complex nationwide benefit programs and in preventing individuals from fraudulently obtaining benefits under these programs. The Plaintiffs do not deny that the requirement serves these interests; rather, they argue that these interests are not compelling.

The several courts which have addressed the issue of whether these interests are "compelling" have reached different results. In Callahan vs. Woods, No. 83-1698 (9th Cir. March 30, 1984), the Court held that the social security number regulation promotes a compelling state interest. In Mullaney vs. Woods, 97 Cal. App. 3d 710, 158 Cal. Rptr. 902 (3d Dist. 1979), the California Court of Appeals reached the same result in a two to one decision. In Stevens vs. Berger, 426 F. Supp. 896 (E.D. N.Y. 1977), the eminent

Judge Weinstein held that the social security number requirement did not promote a compelling governmental interest.

Despite the existence of the above cases and the substantial body of case law addressed to the question of which governmental interests are "compelling" for purposes of constitutional analysis, it does not appear to the Court that there is any clear answer to the question of whether the governmental interests involved in this case are compelling. We note that the parties in this case, as well as some of the authorities cited above, sometimes fail to distinguish between the question of whether the governmental interest spoken of should be considered "compelling" as a general matter and the question of whether the interest should be deemed "compelling" when considered vis a vis the constitutional right asserted by the party challenging the law or regulation it serves. In our view, the former inquiry is the proper one. To hold that a particular governmental interest is compelling does not preclude a decision that that interest must yield to an individual's constitutional right if the governmental interest may be served by some reasonable less restrictive alternative. *See* Callahan vs. Woods, No. 83-1666, slip op. at 8 (9th Cir. March 30, 1984). Thus, the determination of whether a governmental interest is compelling must be made independent of the determination as to the constitutionally required balance between the interests of the government and the constitutional right of the individual.

We conclude that the government's interest in maintaining the social security number requirement to promote efficiency in the numerous benefit programs in which the number is used and to prevent individuals from fraudulently obtaining benefits under these programs is compelling. As noted above, this conclusion does not depend upon, nor does it dictate the answer to the question of whether an exception to the social security number requirement must be made in an exceptional case, such as is allegedly presented here, where an individual claims that the requirement interferes with his first amendment right. We hold only that, as a general matter and without regard to

any exceptional cases, the social security number requirement promotes compelling governmental interests.

Having reached the above conclusion, we now turn to the question of whether the interests served by the social security number requirement may not be served by some reasonable alternative means which would not burden the Plaintiffs' first amendment rights. If such reasonable alternative means exists, the social security number requirement must yield to the Plaintiffs' first amendment right. Callahan vs. Woods, No. 83-1668 (9th Cir. March 30, 1984), *supra*. The federal Defendants have submitted statements executed by Harris G. Factor, Philip Harnet, and Virgil Conrad, all of whom are officials of the Department of Health and Human Services and Department of Agriculture familiar with the use of social security numbers in the benefit programs administered by these departments. The Defendants have submitted these affidavits to support the proposition that it would be impossible, or at least impractical, to utilize any identifier other than a social security number for the purposes for which social security numbers currently are employed. The Plaintiffs have not submitted any affidavit or other evidence to controvert the Defendants' allegation that no less restrictive alternative to the social security number requirement exists. However, the Plaintiffs argue that the evidence submitted by the federal Defendants does not establish that it would be impossible or impractical to exempt the Plaintiffs from the social security number requirement. The Plaintiffs point out that the Defendants do not maintain that it would be impossible or impractical to exempt the Plaintiffs from the social security number requirement; rather, the Defendants argue that development of an alternative to the social security number on a system-wide basis would be extremely expensive and time-consuming.

Finally, the Defendants argue that if an exception to the social security number requirement were made for the Plaintiffs, the Defendants would be faced with an avalanche of requests for exemption from the social security number requirement on religious grounds. The Plaintiffs point out that the Defendants have failed to present evidence that

more than a handful of welfare benefit recipients seek exemption from the social security number requirement. Hence, the Defendants "avalanche" argument does not support their motion for summary judgment.

We agree with the Plaintiffs that the federal Defendants have not presented evidence sufficient to establish conclusively that it would be impossible to serve the Government's interest by some reasonable means other than use of the social security number. The Defendants' argument that exempting the Plaintiffs from the social security number requirement would eliminate uniformity in the system and impose some burden on the Defendants does not establish that it would be impossible or even difficult to use some identifier for Little Bird of the Snow other than a social security number without compromising the government's interest in maintaining a generally efficient and fraud-resistant system. In addition, as was the case in Callahan vs. Woods, No. 83-1668 (9th Cir. March 30, 1984) the Defendants in this case have not presented any evidence regarding the costs which might be incurred by the government if exceptions are made to the social security number requirement. Callahan, slip op. at 18, footnote 4.

In the light of the foregoing, we will deny the federal Defendants' motion for summary judgment.

We turn now to Defendant Cohen's motion for summary judgment. Because Cohen is required by federal law to enforce the social security number requirement, he relies on the arguments presented by the federal Defendants with respect to the Plaintiffs' first amendment claim. To the extent that Cohen's motion relies on the arguments presented by the federal Defendants, we will deny his motion for the reasons discussed above.

Cohen also argues that because the Plaintiffs seek a retroactive award of damages in this case, their suit against Cohen in this Court is barred by the eleventh amendment guarantee of sovereign immunity to the states. *See* Edelman vs. Jordan, 415 U.S. 651 (1974). We agree with Cohen that he is a nominal defendant only and that the Plaintiffs seek, in effect, an award of damages against the state itself. *See id.* at 668.

The Plaintiffs maintain that Cohen has waived his eleventh amendment immunity as a result of an exchange of letters in March 1980 between Plaintiffs' counsel and a representative of the Pennsylvania DPW. In the course of that correspondence, Mr. Roy's attorney indicated that he agreed to a remand of Mr. Roy's claim against the DPW on the understanding that "he will be awarded retroactive benefits if he should ultimately prevail." At the time of this correspondence, Roy was engaged in litigation in a Pennsylvania state court on which the eleventh amendment has no effect. Mr. Roy was not at that time involved in litigation in federal court nor had he indicated that he would bring a claim against Cohen in federal court. Consequently, we agree with Cohen that there is no evidence of any "clear declaration" that he intended to waive his eleventh amendment immunity and he therefore did not waive that immunity. Edelman vs. Jordan, 415 U.S. 651, 673 (1974).

The Plaintiffs in this action also seek an injunction barring Cohen from refusing to provide benefits to the Plaintiffs allegedly in violation of their first amendment rights. The Plaintiffs' claim for prospective injunctive relief is not barred by the eleventh amendment. *Edelman*, 415 U.S. at 664. Consequently, we will grant Cohen's motion for summary judgment on those counts in the complaint seeking a retroactive award of benefits and will deny Cohen's motion for summary judgment on the counts seeking injunctive or other equitable relief.

The Plaintiffs have also filed an alternative motion for a preliminary injunction. Because this case has been rescheduled for trial at the top of the Court's May, 1984 trial list, and is the next case to be tried, we will consolidate the hearing on the Plaintiffs' motion for preliminary injunctive relief with the trial of this case on the merits. *See* Fed.R.Civ. Pro. 65(a)(2).

An appropriate order will be entered.

/s/ Muir
MUIR, U.S. District Judge

DATED: MAY 15, 1984

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 83-1179
Complaint Filed 6/17/83
(Judge Muir)

STEPHEN J. ROY AND KAREN MILLER, PLAINTIFFS

v.

WALTER COHEN, ET AL., DEFENDANTS

ORDER

1. The Plaintiffs' motion for summary judgment is denied.

2. The federal Defendants' motion for summary judgment is denied.

3. Defendant Cohen's motion for summary judgment is granted as to those counts in the complaint wherein Plaintiffs seek a retroactive award of benefits and denied in all other respects.

4. The hearing on the Plaintiffs' motion for a preliminary injunction will be consolidated with the trial of this action.

/s/ Muir
MUIR, U.S. District Judge

DATED: May 15, 1984

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 83-1179

STEPHEN J. ROY AND KAREN MILLER, PLAINTIFFS

v.

WALTER COHEN, ET AL., DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN this 17th day of July, 1984, that Defendants Margaret Heckler, Secretary of the Department of Health and Human Services, and John Block, Secretary of Agriculture, hereby appeal to the Supreme Court of the United States from the judgment of this Court entered on the 22nd day of June, 1984 in favor of Plaintiffs and against said Defendants, entering judgment in favor of Plaintiffs and granting Plaintiffs' request for injunctive relief.

This appeal is taken pursuant to Title 28 United States Code, Section 1252.

Respectfully submitted,

DAVID DART QUEEN
United States Attorney

By HARRY A. NAGLE
Assistant United States Attorney
Post Office Building
Lewisburg, PA 17837
Telephone: 717-524-4415

DATED: JULY 17, 1984
FILED: JULY 18, 1984

84-780

Office Supreme Court, U.S.
FILED
DEC 3 1984
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

MARGARET M. HECKLER, Secretary of Health and Human Services, et al., APPELLANTS

v.

STEPHEN J. ROY, et al.

On Appeal from the United States District Court for the Middle District of Pennsylvania

---

Response of Appellee Walter Cohen, Secretary of the Pennsylvania Department of Public Welfare, in Support of Jurisdictional Statement of Appellants Heckler & Bloch

---

LeROY S. ZIMMERMAN
Attorney General

BY: JOEL M. ROSSLER*
Deputy Attorney General

ANDREW S. GORDON
Senior Deputy Attorney General

ALLEN C. WARSHAW
Senior Deputy Attorney General
Chief, Litigation Section

*Counsel of Record

Office of Attorney General
1565 Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 783-1471

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PROCEDURAL HISTORY	1
INTEREST OF SECRETARY COHEN	4
THE QUESTION IS SUBSTANTIAL	7
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:	Page
Bob Jones University v. United States, ___ U.S. ___, 103 S.Ct. 2017 (1983)	6
King v. Smith, 392 U.S. 309 (1968)	4
Miller v. Youakim, 440 U.S. 125 (1979)	4
Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976)	6
Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856)	6
Dyster Federation No. 91 v. Wright, 364 U.S. 642 (1961)	6
United States v. Lee, 455 U.S. 252 (1982)	6
Constitutional Provisions:	
U.S. Constitution, Amendment I	1
Federal Statutes:	
7 U.S.C. § 2020(g)	4
7 U.S.C. § 2025(e)	1,4
42 U.S.C. § 602(a)(25)	1,4
State Statutes:	
62 P.S. § 432.3(b)(3)	1

PROCEDURAL HISTORY

On August 17, 1983, appellees Stephen J. Roy and Karen Miller filed a complaint with the United States District Court for the Middle District of Pennsylvania seeking relief from the requirement of state and federal law[1] that participants in the Aid to Families with Dependent Children (AFDC) program and the Food Stamp program furnish the Pennsylvania Department of Public Welfare (DPW) with the social security numbers of their household members as a condition of receiving program benefits. Plaintiffs claimed that this requirement interfered with their right to the free exercise of religion in violation of the First Amendment to the United States Constitution. Named as defendants were

---

[1] See 62 P.S. § 432.2(b)(3) (Pennsylvania Public Welfare Code); 42 U.S.C. § 602(a)(25) (AFDC); 7 U.S.C. § 2025(e) (Food Stamps).

the state and federal officials charged with the administration of these programs: Walter Cohen, the Secretary of DPW, Margaret Heckler, the Secretary of Health and Human Services, and John Block, the Secretary of Agriculture.

Following a four day bench trial before the Honorable Malcolm S. Muir, the district court found the social security number requirement unconstitutional as applied to plaintiffs. The defendants were enjoined from refusing to provide cash assistance, medical assistance, and food stamps to the plaintiffs' daughter, Little Bird of the Snow, for the plaintiffs' failure to provide a social security number for her. The district court's opinion, filed on June 22, 1984, is published at 590 F. Supp. 600 (M.D. Pa. 1984).

Defendants Heckler and Block filed a notice of appeal to this Court

on July 18, 1984 (hereinafter the federal appeal). Defendant Cohen filed a notice of appeal to this Court on July 20, 1984.(hereinafter the state appeal). On September 11, 1984, Justice Brennan extended the time within which to docket the federal appeal to and including November 15, 1984. On September 12, 1984, Justice Brennan extended the time within which to docket the state appeal to and including November 19, 1984.

The Solicitor General filed a jurisdictional statement and the federal appeal was docketed on November 13, 1984. Rather than pursue his separate appeal, defendant Cohen filed a motion to dismiss the undocketed state appeal on November 21, 1984.[2]

---

[2]The district court granted this motion and dismissed the appeal on November 27, 1984.

INTEREST OF SECRETARY COHEN

From the outset of this litigation, Secretary Cohen has chosen to follow the lead of his federal co-defendants.[3] Thus, in the district court, the Secretary adopted by reference the federal defendants' brief in support of their motion for summary judgment and their proposed findings of fact and conclusions of law. At trial, Secretary Cohen chose to present only one witness and his counsel's questioning of witnesses and oral argument was designed to supplement that of federal trial

---

[3]This strategy is consistent with the status of the AFDC and Food Stamp programs as joint federal-state undertakings. In order to receive federal funds provided under these programs, Pennsylvania was obliged to comply with federal conditions placed on that participation. Miller v. Youakim, 440 U.S. 125 (1979); King v. Smith, 392 U.S. 309 (1968), including the requirement that recipients of assistance furnish their social security numbers as a condition of eligibility. See 42 U.S.C. § 602(a)(25); 7 U.S.C. §§ 2020(g), 2025(e).

counsel. This course of action was followed because the interests of Secretary Cohen in this action are indistinguishable from those of Secretaries Heckler and Block.

At pages 8-10 of the Solicitor General's jurisdictional statement, he highlights a variety of reasons why social security numbers are necessary to the administration of these massive public assistance programs. The computerization of data systems is, of course, not limited to the federal government. State agencies as well use computer cross-matching of the massive amounts of data collected to verify applicants' resources and income and to ensure that benefits are not being obtained through fraudulent means.

In view of the identity of interests of the state and federal defendants, and the ability and intent

of the federal defendants to present on appeal every contention in support of reversal that would be argued by Secretary Cohen, it seems clear that it would have been an unnecessary duplication of effort for Secretary Cohen to continue with his own appeal.[4] Thus, no inference adverse to the position of the federal appellants should be drawn from Secretary Cohen's dismissal of his separate appeal.

---

[4]Should this Court agree with the Solicitor General that the district court's ruling was erroneous as a matter of law, there will be no basis for continuation of the injunction issued by the district court and it will have to be vacated as against all defendants, whether or not each one appealed. Pasadena City Board of Education v. Spangler, 427 U.S. 424, 437 (1976); Hotel & Restaurant Employees & Bartenders International Union, Local 531 v. Wisconsin Employment Relations Board, 427 U.S. 132, 139 (1976); Local No. 438 Construction & General Laborers' Union v. Curry, 371 U.S. 542, 549 (1963); Local No. 438 Construction & General Laborers' Union v. Curry, 371 U.S. 542, 549 (1963); Hotel & Restaurant Employees International Union, Local 25 v. Wilson, 325 U.S. 693, 699 (1945); Textile Workers Union of America, CIO v. Arista Mills Co., 308 U.S. 403, 404 (1940

THE QUESTION IS SUBSTANTIAL

At issue in this case is whether Congressional directives that social security numbers be required of all recipients of federal-state welfare programs should be set aside due to an asserted infringement of free exercise rights of one individual. The district court's invalidation of Congress' mandate seriously jeopardizes the government's ability to combat fraud in federal-state welfare programs and to promote the administrative efficiency of such programs through the uniform application of a logical, neutral rule that even the district court found serves a compelling governmental interest.

The district court's ruling, based as it was on a flawed premise -- that the smaller the number of persons objecting to a neutral requirement on religious grounds, the greater their

claim to an exemption from the requirement -- conflicts with this Court's recent rulings in Bob Jones University v. United States, ___ U.S. ___, 103 S.Ct. 2017 (1983), and United States v. Lee, 455 U.S. 252 (1982). As those cases demonstrate, if a religious belief cannot be accomodated with a compelling governmental interest and no less restrictive means is available to achieve the governmental interest, the government's interest must prevail. When that test is applied to the facts of this case, it is clear that the individual's interest in religious liberty should have yielded to the greater interest of society in the efficient and effective administration of its welfare programs. In ruling to the contrary, the district court committed reversable error.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

LEROY S. ZIMMERMAN
Attorney General

BY: JOEL M. RESSLER *
Deputy Attorney General

ANDREW S. GORDON
Senior Deputy Attorney General

ALLEN C. WARSHAW
Senior Deputy Attorney General
Chief, Litigation Section

* Counsel of Record

Office of Attorney General
1545 Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 783-1471

Date: November 30, 1984

(3)

No. 84-780

Supreme Court, U.S.
FILED
DEC 21 1984
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

STEPHEN J. ROY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE APPELLANTS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

9pp

TABLE OF AUTHORITIES

Page

Cases:

Alcarez v. *Block*, 746 F.2d 593 4

Braunfeld v. *Brown*, 366 U.S. 599 3

Heckler v. *Campbell*, No. 81-1983 (May 16, 1983) 3

Regan v. *Time, Inc.*, No. 82-729 (July 3, 1984) 2

Schweiker v. *Hansen*, 450 U.S. 785 5-6

Sherbert v. *Verner*, 374 U.S. 398 ..... 4, 5

Constitution and statute:

U.S. Const. Amend. I (Free Exercise Clause) 2, 6, 7

American Indian Religious Freedom Act, 42 U.S.C. 1996 6

§ 2, 42 U.S.C. 1996 note 6

Miscellaneous:

124 Cong. Rec. 21444 (1978) 6

U.S. Dep't of the Interior, *American Indian Religious Freedom Act Report* (1979) 6

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-780

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

STEPHEN J. ROY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE APPELLANTS

An Act of Congress has been invalidated based on the district court's judgment that appellees should not have to comply with the statutory requirement that AFDC and food stamp recipients provide their state welfare agencies with their SSNs. The validity of this statutory requirement as applied to those who seek federal welfare benefits clearly presents a substantial question of considerable importance. Appellees' attempts to dismiss the significance of this case are unavailing.

1. Appellees urge the Court to affirm the judgment below because, according to them, the government does not challenge the legal standard employed by the district court to evaluate their Free Exercise claim but instead disputes only the district court's findings of fact (Mot. to Aff. 14-15). Appellees have seriously misstated our position in their

attempt to sweep aside the important constitutional question presented by this case. As we made clear in our jurisdictional statement (at 13-15, 17-18), our concern is with the legal approach used to analyze claims that facially neutral statutory requirements violate the Free Exercise Clause.

Appellees (Mot. to Aff. 17-19, 25-26), like the district court (J.S. App. 9a, 18a-21a), focus their legal analysis solely on the number of persons who potentially might seek a religious exemption from the SSN requirement. In our view, however, the "least restrictive alternative" inquiry in Free Exercise cases must focus on the programmatic interests furthered by the statutory requirement at issue — in this case, verifying eligibility, preventing and detecting fraud, and promoting efficient administration of massive government programs. If the government can accomplish its objectives equally well by adopting a less restrictive alternative applicable to the populace as a whole, then it may be appropriate to require the government to adopt that alternative in the case of a particular plaintiff. But if SSNs are required to accomplish Congress's general goals in the administration of federal welfare programs, then the government should not be required to devise alternatives simply because the granting of a handful of exemptions might work only a marginal interference with its legislative purposes. Cf. *Regan* v. *Time, Inc.* No. 82-729 (July 3, 1984), slip op. 16 n.12 ("[I]n determining whether a time, place, and manner regulation substantially serves the State's interest, the effectiveness of the regulation should not be measured solely by the adverse consequences of exempting a particular plaintiff from the regulation."). Despite appellees' denials, therefore, it is clear that the government's challenge to the judgment below rests on our submission that the district court employed an erroneous legal analyis.

Moreover, when placed in proper perspective, there is no doubt that the question is substantial. As much as it may distress appellees and others, there is no escaping the fact that government programs and government itself have grown to enormous proportions. See *Heckler* v. *Campbell*, 461 U.S. 458, 461 n.2 (1983). As the Court recognized in *Braunfeld* v. *Brown*, 366 U.S. 599, 606 (1961), there comes a point at which accommodation of religious beliefs "radically restrict[s] the operating latitude of the legislature." A decision that Congress may not require all persons who seek federal welfare benefits to comply with facially neutral administrative requirements essential to sound administration of the programs at issue crosses the line between sensible accommodation and radical restriction on the operating latitude of the legislature. No decision of this Court requires the government to design individually-tailored eligibility standards to satisfy the most idiosyncratic religious beliefs, even if there is no question concerning the sincerity of those beliefs.

2. The "least restrictive alternative" inquiry in Free Exercise cases becomes relevant only after it is determined that the plaintiff has a sincerely held religious objection to the requirement at issue and that the requirement serves a compelling governmental interest. In the present case, the first point is not in dispute. Moreover, until the filing of appellees' motion to affirm, neither was the second point at issue. Appellees now argue, however, that the SSN requirement does not serve a compelling governmental interest (Mot. to Aff. 10-14). In this instance, it is appellees who ask the Court to disregard the district court's contrary findings (see J.S. App. 15a, 18a, 32a) as well as their own prior admissions (see, *e.g.*, Mot. to Aff. App. 6a-8a; 5/17/84 Tr. 26) that the SSN requirement serves important governmental interests in a programmatic sense. Appellees' attack on

the importance of the SSN requirement, like their legal arguments, focuses exclusively on the effect of granting an exemption to Little Bird of the Snow alone (Mot. to Aff. 17-24). But as we have consistently argued, that is not the issue in this case. Appellees offer no credible argument to refute the clear evidence (see J.S. 8-10) that the AFDC and Food Stamp programs cannot be effectively managed in the absence of the SSN requirement.[1]

In any event, appellees' contention that the government lacks a compelling interest in verifying eligibility, preventing and detecting fraud, and administering massive welfare programs effectively and efficiently is simply frivolous. See *e.g., Alcarez* v. *Block*, 746 F.2d 593, 606 (9th Cir. 1984). Appellees rely (Mot. to Aff. 12) on *Sherbert* v. *Verner*, 374 U.S. 398, 407 (1963), in which the Court held that the *unsubstantiated potential* for fraud and abuse is not a

---

[1]Appellees argue (Mot. to Aff. 21 n.10) that a government manual introduced at trial demonstrates that factors other than SSNs have a higher degree of reliability for purposes of cross-matching than do SSNs. Appellees neglect to point out, however, that the manual on which they rely is out of date and no longer used (5/21/84 Tr. 116-117). birthdate into a Social Security Administration computer. From this fact, ote (Mot. to Aff. 21-22) that the existence appellees appear to argue of the Snow's SSN was determined by entering her name and (*ibid.*) that the possibility of conducting searches by name and birthdate obviates the need for SSNs. Appellees again neglect to mention a crucial fact, which is that the only information that can be discovered by the type of search conducted in this case is whether or not a person has an SSN. 5/22/84 Tr. 13, 110. The computer system used for this purpose, known as the "Alphadent" system, obviously is necessary to process applications for SSNs and obviously must rely principally on a person's name and birthdate. But it serves none of the functions necessary in the administration of the AFDC and Food Stamp programs, such as verification of income and resources, because that type of information is maintained in other computer systems that are most commonly accessed by SSNs.

compelling state interest.[2] Here, by contrast, it is undisputed that fraud and abuse in federal welfare programs are real and susbstantial problems on which Congress has focused considerable attention. See, *e.g.*, J.S. 19-20; J.S. App. 7a, 15a; Mot. to Aff. App. 7a. It cannot seriously be urged that the government lacks a compelling interest in ensuring that expenditures of nearly $20 billion per year (see J.S. 8) are properly spent.

3. Appellees beg the question in this case by arguing (Mot. to Aff. 34-38) that the district court's decision is consistent with the intent of Congress to grant welfare benefits to needy individuals. Congress imposed certain requirements on benefit recipients, and the SSN requirement is one of them. Appellees are unable to demonstrate any congressional intent to confer benefits on individuals who refuse to comply with the statutory requirements for eligibility. See *Schweiker* v. *Hansen*, 450 U.S. 785, 790

---

[2]The Court wrote (374 U.S. at 407):

> The [State] suggest[s] no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might * * * dilute the unemployment compensation fund * * *. But that possibility is not apposite here because no such objection appears to have been made before the South Carolina Supreme Court * * *. Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance.

Not only was the possibility of fraud in *Sherbert* wholly speculative, but it also related to fraudulent *religious* claims. In the present case, by contrast, there is no dispute concerning the sincerity of Roy's religious beliefs, nor does the government contend that many people are likely to feign religious objections to the SSN requirement. Rather, the government's concern with fraud relates to the entirely distinct matter of persons attempting to obtain welfare benefits in contravention of the eligibility standards established by Congress. There is nothing speculative about this concern, nor has any decision of this Court dismissed it as an insubstantial interest.

(1981) (Congress conditioned the receipt of Social Security benefits on the filing of a written application, and a "court is no more authorized to overlook [this requirement] than it is to overlook any other valid requirement for the receipt of benefits."). Obviously, it is appellees' position, and not the government's, that thwarts Congress's intent to provide benefits only to those persons who satisfactorily demonstrate their entitlement to them.

Nor is there any merit to appellees' argument (Mot. to Aff. 36-38) that denial of welfare benefits to Little Bird of the Snow would constitute discrimination based on religion. Appellees' reliance (*ibid.*) on the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. 1996, is particularly misplaced. AIRFA was intended only to ensure that Native Americans receive the same protection under the First Amendment to which all Americans are entitled; it was not intended to grant Native Americans any greater rights. See 124 Cong. Rec. 21444 (1978) (remarks of Rep. Udall); U.S. Dep't of the Interior, *American Indian Religious Freedom Act Report* 18 (1979) ("This act is in no way intended to alter that guarantee [of the Free Exercise Clause] or override existing laws, but is designed to prevent government actions that would violate these Constitutional protections."). Moreover, the operative provision of AIRFA has been satisfied and exhausted. The Act contains only two sections, a policy statement and an operative provision. The operative provision, contained in Section 2 of the Act, 42 U.S.C. 1996 note, required that the President direct federal agencies to evaluate their policies and procedures "in consultation with native traditional religious leaders" and report their findings to Congress within 12 months. This requirement was fulfilled when the President released the *American Indian Religious Freedom Act Report* in August 1979. Thus, all that remains of AIRFA is the policy section which, as noted

above, in no way broadened the scope of protection for religious freedom beyond that afforded by the First Amendment itself.

4. Finally, appellees are unable to offer any satisfactory rationale to justify the district court's issuance of an injunction prohibiting Secretary Heckler from "using or disseminating" the SSN that was assigned to Little Bird of the Snow at the request of her mother, appellee Miller. Appellees argue (Mot. to Aff. 40-41) that they would be injured by the government's use of Little Bird of the Snow's SSN. Assuming that to be so, the injury is not legally cognizable. The Free Exercise Clause prevents government from forcing one to act or think in contravention of one's religious beliefs, but that is all. If the Secretary were to use and disseminate Little Bird of the Snow's SSN, appellees would not be forced to join in that act or to believe that it was proper. Their potential distress at witnessing the act simply does not implicate rights protected by the Free Exercise Clause.

For the foregoing reasons, as well as those set forth in our jurisdictional statement, probable jurisdiction should be noted.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1984

DOJ-1984-12

Office-Supreme Court, U.S.
FILED
JUL 30 1985
ALEXANDER L. STEVAS
CLERK

No. 84-780

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

STEPHEN J. ROY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOINT APPENDIX

GARY S. GILDIN
130 South College Street
Carlisle, Pennsylvania 17013
(717) 243-4611

FRANKLIN A. MILES
100 Pine Street
P.O. Box 1166
Harrisburg, Pennsylvania 17108
(717) 232-8000
Counsel for Appellees Roy and Miller

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Appellants

JOEL M. REBIBER
Deputy Attorney General
Commonwealth of Pennsylvania
Office of the Attorney General
Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 783-1471
Counsel for Appellee Cohen

JURISDICTIONAL STATEMENT FILED NOVEMBER 13, 1984
PROBABLE JURISDICTION NOTED JUNE 17, 1985
Volume I

BEST AVAILABLE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-780

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

STEPHEN J. ROY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

INDEX*

	Page
Chronological List of Relevant Docket Entries from the United States District Court for the Middle District of Pennsylvania	1
Comprehensive Statement of Undisputed Facts	13
Affidavit of Philip Harant, Director of the Division of Earnings Systems, Social Security Administration, Department of Health and Human Services, dated February 14, 1984	21
Affidavit of Harris G. Factor, Director of the Office of Regulations, Social Security Administration, Department of Health and Human Services, dated February 14, 1984	25
Declaration of Virgil Conrad, Deputy Administrator of the Family Nutrition Programs, Food and Nutrition Service, United States Department of Agriculture, dated February 22, 1984	33
Trial Transcript, May 17-18, 21-22, 1984	39
Order noting probable jurisdiction	328

* Pursuant to Rule 36.1 of the Rules of this Court, the Opinion and Order of the District Court, dated June 22, 1984, and its Opinion and Order denying the parties' motions for summary judgment, dated May 15, 1984, have been reproduced in the appendix to the jurisdictional statement.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 83-1179

STEPHEN J. ROY AND KAREN MILLER, PLAINTIFFS

v.

WALTER COHEN, ET AL.

RELEVANT DOCKET ENTRIES

Date	Nr.	Proceedings
1983		
Aug. 17	1	COMPLAINT—
Aug. 17		NOTICE—and Consent form re Mag. Referral mailed to Atty. Miles.
Aug. 17	2	AFF./DEC.—in support of request to proceed in forma pauperis.
Aug. 17		J.S. 5 (Original docket to Judge Muir 8/18/83)
		• • • • •
Aug. 19	4	ORDER #1—Motion to proceed ifp granted (M) Copies to Plf. counsel, Atty. Genl. of PA and USA—Scrn.
Aug. 19	5	ORDER #2—Case tentatively set for 5/84 in Wmpt. Counsel to consult with each other in an attempt to agree upon a scheduling order, submittable within 2 mos. after date of this order, either jointly or separately, possibility of scheduling conference (M) Copies to Plf. counsel, Atty. Genl. of PA, USA-Scrn.
		• • • • •
Sept. 1	8	RETURNS OF SERVICE—for summons and complaint served personally on Atty. Genl. of PA via Frances Dougherty, Secy., on 8/22/83, served personally on U.S. Atty.—Scrn. via Lorene Glant, Secy., on

		8/22/83, served personally on Secy., PA Dept. of Public Welfare via Myra Werrin Sacks, Assty. Counsel. on 8/22/83, served by cert. mail on Atty. Genl. of U.S. on 8/22/83 and accepted 8/25/83, served by cert. mail on Secy. of Agriculture on 8/22/83 and accepted 8/25/83, served by cert. mail on Secy. of HHS on 8/22/83 and accepted 8/25/83
Sept. 13	9	ANSWER—of deft. Walter Cohen & c of s.
Oct. 20	10	ANSWERS—of Def. Walter Cohen to Interrogatories of Plfs.; c of s
		* * * * *
Oct. 24	12	ANSWER—of Federal Defs. to Complaint
		* * * * *
Nov. 14	14	PROPOSED SCHEDULING ORDER of Plfs., C of conc. and S
Dec. 14	15	SCHEDULING ORDER—Case placed on Wmpt. 5/84 trial list; paragraphs re. motions, amendment of pleadings, hearings on motions, joinder of parties, modification of schedule. Settlement conf. 4/2/84; discovery cutoff 4/13/84; final pre-trial conf. 5/7/84; jury selection 5/8/84 (M) Copies to Attys. Miles, Gildin, Nagle, Ressler, Hirt
1984		
Feb. 3	16	MOTION—of Plfs. for Summary Judgment or in the Alternative for Prelim. Injunc., partial cert. of non-conc. (one counsel only), C of S, proposed orders
Feb. 3	17	BRIEF—of Plfs. in Support of Motion for Summary Judgment or Alternatively for Prelim. Injunc., C of S
Feb. 7	18	SUPP. C OF NON-CONC.—of Defs. Heckler and Block to Plf. Motion for Summary Judgment
		* * * * *
Feb. 28	22	MOTION—of Federal Defs. to Dismiss or Alternatively for Summary Judgment, C of

		non-conc. and S, proposed order, Statement of Material Facts
Feb. 28	23	BRIEF—of Federal Defs. in Support of Motion to Dismiss or Alternatively for Summary Judgment, C of S
Feb. 28	24	DECLARATION—of Virgil Conrad
Feb. 28	25	AFFIDAVIT—of Harris G. Factor
Feb. 28	26	AFFIDAVIT—of Philip Harant
Feb. 28	27	RESPONSE—of Federal Defs. to Plfs. Statement of Material Facts
Feb. 28	28	BRIEF—of Federal Defs. in Opposition to Plfs. Motion for Summary Judgment or Alternatively for Preliminary Injunction, C of S
Feb. 28	29	BRIEF—of Walter Cohen in Opposition to Plf. Motion for Summary Judgment or Alternatively for Preliminary Injunction, C of S
Mar. 2	30	CERT. OF NON-CONC.—re. Federal Defs. Motion to Dismiss or Alternatively for Summary Judgment, stating Plf. counsel will not give his concurrence
Mar. 8	31	BRIEF—of Plfs. in Reply to Def. Opposition to Plf. Motion for Summary Judgment or Alternatively for Prelim. Injunc., C of S
Mar. 8	32	ORDER—Settlement conf. in Wmpt. 4/2/84 at 3 PM, counsel expected to try case shall attend. Terms of election to cancel explained (M) Copies to Attys. Miles, Golden, Nagle, Ressler, Hirt & Wise, Allaben, Jones
Mar. 9	33	MOTION—of Plfs. for Leave to Adopt Briefs, C of conc. and S, proposed order
Mar. 9	34	BRIEF—of Plfs. in Support of Motion to Adopt Briefs, C of S
Mar. 9		ORDER SIGNED—Plfs. granted leave to adopt as their Brief in Opposition to Fed. Defs. Motion to Dismiss or Alternatively for Summary Judgment both their Brief in Support of Their Motion for Summary Judgment or Alternatively for Prelim.

Injunc. and their Reply Brief to Defs. Brief in Opposition to their Motions. Pltfs. Brief in Opposition to Fed. Defs. Motion to Dismiss or Alternatively for Summary Judgment shall be deemed to have been filed the date of this order. (M) Copies to all counsel of record

Mar. 13 35 MOTION—of Def. Walter Cohen for Summary Judgment, C of conc. of other Def., non-conc. of Plf., C of S, proposed order

Mar. 15 36 RESPONSE—of Plf. to Federal Defs. Statement of Material Facts, C of S

Mar. 14 37 MOTION—of Def. Cohen for Leave to File Surrebuttal Brief, C of conc. and S, proposed order (copy of surrebuttal brief attached)

Mar. 19 ORDER SIGNED—Motion of Def. Cohen for leave to file surrebuttal brief granted. Def. Cohen's surrebuttal brief shall be deemed to have been filed as of the date of this order (M) Copies to counsel of record.

• • • • •

Mar. 22 39 MOTION—of Pltfs. for Leave to Adopt Briefs and Response, C of conc. and S, proposed order

Mar. 22 40 BRIEF—of Pltfs. in Support of Motion to Adopt Briefs and Response C of S

Mar. 23 ORDER SIGNED—ORDERED that Pltfs. are granted leave to adopt as their Brief in Opposition to Def. Cohen's Motion for Summary Judgment their Brief in Support of their Motion for Summary Judgment or Alternatively for Prelim. Injunc., their Reply Brief to Def. Brief in Opposition to their Motions and their Response to Federal Defs. Statement of Material Facts. Plf. Brief in Opposition to Def. Cohen's Motion for Summary Judgment shall be deemed to have been filed the date of this Order (M) Copies to all counsel of record.

Mar. 30	41	REPLY BRIEF—of Fed. Defs. in Support of Motion to Dissmiss or Alternatively for Summary Judgment, C of S
Apr. 2	42	ELECTION—of Plfs. to Cancel Settlement Conf. in non-jury case, C of conc. and S, proposed order (unsigned)
Apr. 17	43	REVISED MAY TRIAL LIST—Case listed as No. 8, to begin in order (M) Copies to Attys. Miles, Gilden, Nagle, Ressler, Hirt & Wise, Allaben, Jones
May 1	44	NOTICE—of Federal Defs. of Recent Decision of U.S. Court of Appeal Ninth Circuit, letter of service thereon
May 7	45	PRETRIAL MEMO—of Plfs.
May 7	46	PROPOSED EXHIBIT LISTING—of Plfs.
May 7	47	STATEMENT OF UNDISPUTED FACTS—of Plfs.
May 7	48	PRETRIAL MEMO—of Def. Walter Cohen
May 7	49	PRETRIAL MEMO—of Fed. Defs.
May 7	50	PROPOSED FINDINGS & CONCLUSIONS OF LAW—of Fed. Defs.
May 7	51	MINUTE SHEET—for pre-trial conf. held in Wmpt. at 3:15 P.M.
May 9	52	ORDER—Non-jury case. Case not to be bifurcated. Plf. motion for summary judgment denied. Fed. Defs. motion for summary judgment denied. Def. Cohen motion for summary judgment denied. Hearing on Plf. motion for prelim. injunc. to be consolidated w/trial on the merits. Case not to be tried 5/22 or during period 5/25 through 9/4/84 inclusive. Counsel may file trial briefs or may elect to rely upon briefs filed in connection w/summary judgment motion. Counsel for Plfs shall be entitled to an opening statement of 45 minutes, counsel for Fed. Defs. shall be entitled to like time and counsel for State defs. shall be entitled to like time for opening (M) Copies to all counsel of record.

May 11	53	ORDER—Case advanced to top of 5/84 list. Clerk to notify counsel for parties of contents of this order by phone today. Clerk shall also send copy of this order to counsel in cases on 5/84 list which have lower numbers than this case, Cases 1 and 2, and 6, so that they will be aware of the advancement of this case (M) Copies to counsel in this case, and also to counsel in cases 1, 2 and 6. Counsel in this case telephoned.
May 15	54	OPINION—and ORDER—of Ct. that 1. Plfts' motion for summary judgment is denied. 2. The federal Defts' motion for summary judgment is denied, 3. Deft. Cohen's motion for summary judgment is granted as to those counts in the complaint wherein Pltfs. seek a retroactive award of benefits & denied in all other respects. 4. The hearing on the Pltfs' motion for a preliminary injunction will be consolidated with the trial of this action. (M) Copy to Miles, Gildin, Nagle, Ressler, Hirt, Allaben & Jones.
May 17	55	SUPPL. TRIAL BRIEF—of plf
May 17	56	TRIAL MEMO—of Def. Cohen; c of s
May 17	57	AMENDMENT—to Fed. Defs' pretrial memorandum; c of s
May 17	58	TRIAL BRIEF—of Federal Defs; c of s
May 18	59	MOTION—of Plfs. for Exclusion of Witnesses from Courtroom during testimony of other witnesses
May 22	60	SUPP. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—of Plf.
May 22	61	ADDITIONAL FINDINGS—of Federal/ State Defendants
May 22	62	MINUTE SHEETS—for trial held in Wmpt. 5/17, 18, 21 and 22/84
May 22	63	EXHIBIT LISTING—for trial held in Wmpt. 5/17, 18, 21 and 22/84
May 24	64	ORDER—Citations to case of Stephens v. Berger at pgs. 4 and 7 of Court's 5/15/84

opinion in this case amended to read "428 F. Supp. 896 (E.D.N.Y. 1977)." (M) Copies to counsel***

May 29 65 TWO PROPOSED ORDERS—of Plfs., one re. permanent injunctive relief, the second alternatively re. relief, certain portions of which would terminate upon sixteenth birthday of Little Bird of the Snow, letter of service thereon

May 29 66 PROPOSED ORDER—of Def. Dismissing Action and Denying Plf. Motions for Prelim. and Permanent Injunctions and for Other Relief, letter of service thereon

June 8 67 REPORTER'S NOTES—for trial held in Wmpt. 5/17/84 through 5/22/84 (2 large envelopes)

June 15 68 MOTION—of Federal defs to dismiss; e of s

June 15 69 BRIEF—of Fed. defs in support of motion to dismiss; e of s

June 15 70 MOTION—of Def. Walter Cohen to Dismiss, C of partial conc. and S, proposed order

June 19 71 SUPP. CERTIFICATE—of Def. Walter Cohen stating Plf. does *not* concur in his Motion to Dismiss, C of S

June 21 72 SUPP. CERTIFICATE—of Federal Defs. stating Plf. *does not* concur in Federal Defs. Motion to Dismiss, C of S

June 22 73 OPINION & ORDER—Defs. Cohen and Heckler, in their official and individual capacities, their successors, agents & employees and all persons acting in concert w/them are restrained until 12/26/1996 from denying Plf. Roy cash assistance and medical assistance benefits for Little Bird of the Snow for Plfs. failure to provide social security # for her. Defs. Cohen and Block, acting in their official and individual capacities, their successors, agents & employees and all persons acting in concert w/them, are restrained until 12/26/1996 from refusing to provide food stamps for Little Bird of the Snow for Plf.

failure to provide social security # for her. Def. Heckler, acting in her official and individual capacities, is permanently restrained from making any use of social security # which was issued in name of Little Bird of the Snow Roy and for disseminating # to any agency, individual, business entity or any other third pty. Def. Heckler is ordered to notify any agency, individual, business entity or other third pty. to which number has been provided and demand that agency permanently refrain from making any use of # and disseminating # to any other agency, person, individual, business entity or any other third pty. Defs. 6/15/84 motions to dismiss case denied. Clerk to enter judgment for Plfs. w/respect to their req. that Defs. be enjoined from refusing to provide benefits for Little Bird of the Snow until her 16th birthday because of Plfs. refusal to provide social security # for her and that Def. Heckler be enjoined from disseminating #. Clerk to enter judgment in favor of Defs. w/respect to all other claims made by Plfs. (M) Copies to all counsel of record, other judges, published

June 22 84 JUDGMENT—Judgment is entered in favor of Plfs. Stephen J. Roy and Karen Miller and against Walter Cohen, et al, w/respect to their requests that Defs. be enjoined from refusing to provide benefits for Little Bird of the Snow until her 16th birthday because of Plfs. refusal to provide a social security number for her and that Def. Heckler be enjoined from disseminating the number; and that judgment is entered in favor of Defs. Walter Cohen et al, w/respect to all other claims made by Plfs. Stephen J. Roy and Karen Miller—Copies to all counsel of record, other judges, published

June 22 J.S. 6—Docket, file, security copy to S.C.O.

June 27	75	MOTION—*of* Federal defts for leave to file documentation *of* application for social security number; Cert *of* concurrence and nonconcurrence. C. *of* S.
June 27	76	BRIEF—*of* federal defts in support *of* Motion (Doc. 75), and C *of* S.
June 29	77	SUPP. BRIEF—*of* federal defendants in support *of* motion for leave to file documentation *of* application for social security number, and C *of* S.
July 11	78	BRIEF—*of* pltfs in opposition to Federal defts' motion for leave to file documentation *of* application for social security # & c *of* s.
July 12	79	MOTION—*of* pltffs for Attorneys' Fees & Costs w/exhibits attached and C *of* S. (rec'd by FAJ 7/17/84)
July 17	80	CERT.—*of* Nonconcurrence: *of* plaintiffs, It is hereby certified that plaintiffs have sought the concurrence *of* counsel for defendants in plaintiffs motion for attorneys' fees and costs and that counsel for defendants did not concur in said motion, and C. *of* S.
July 18	81	NOTICE OF APPEAL—*of* Dfndts Heckler and Block to the Supreme Court *of* the U.S. and C. *of* S. from Order *of* Dist. Court dated 6/22/84.
July 20	82	NOTICE OF APPEAL—($5.00 F.F. pd) *of* Dfndt. Walter Cohen, Sec. of PA Dept. of Public Welfare, to Supreme Court of the U.S., from order & Judgment *of* Dist Court dated 6/22/84, and C. *of* S.
July 20	83	MEMO—*of* law *of* pltfs in support *of* Motion for Attorneys Fees and Costs; C. *of* S.
July 31	84	ORDER—that the federal defts' motion for leave to file documentation is denied. (M) Copies to counsel *of* record.
Aug. 1	85	APPLICATION—*of* defendant, Walter Cohen, for stay *of* proceedings on plaintiffs' motion for award *of* attorneys fees and costs, and CERT.—*of* Concurrence and NonConcurrence, and

		MEMORANDUM OF LAW—in support of Application, and C of S.
		• • • • •
Aug. 21	91	APPEAL—filed by defts Heckler & Block from judgment entered on 6/22/84. Cert cc of notice of appeal to Miles, Gildin, Nagle, Ressler, Hirt, Allaben & Jones w/TL#1. Cert cc of notice to ct of appeals with TL#1, cert cc of docs. 73 & 74 & cert cc of docket entries. Info cc of notice to Judge Muir & ct rep. Joan Spearing.
Aug. 21		TPO—handed to Atty Nagle in Wmspt office.
Aug. 21	92	APPEAL—filed by deft Walter Cohen from judgment entered on 6/22/84. Cert cc of notice of appeal to Miles, Gildin, Nagle, Ressler, Hirt, Allaben & Jones w/TL#1. Cert cc of notice to ct of appeals w/TL#1, cert cc of docs. 73 & 74 & cert cc of docket entries. Info cc of notice to Judge Muir & ct rep. Joan Spearing. ($70 pd)
Aug. 21		TPO—handed to Atty Ressler's representative in Hbg office.
Aug. 30	93	TPO—returned by Joel M. Ressler stating a transcript is already on file.
Sept. 4	94	LETTER—of U.S. Court of Appeals: this is to advise you that the appeal in the above captioned case has been docketed in this Court today at No. 84-5597.
Sept. 4	95	LETTER—to Atty Ressler, Esq. from Court of Appeals dated 8/29/84 docketing his appeal to 84-5596.
Sept. 19	96	TRANSCRIPT—of Non-Jury Trial of 5/17/84.
Sept. 19	97	TRANSCRIPT—of Non-Jury Trial of 5/18/84.
Sept. 19	98	TRANSCRIPT—of Non-Jury Trial of 5/21/84 (Morning Session).
Oct. 2	99	TRANS—of Non-Jury trial held in Wmspt on May 21, 1984 (Afternoon Session).
Oct. 2	100	TRANS—of Non-Jury trial held in Wmspt on May 22, 1984 (Morning Session).
Oct. 2	101	TRANS—of Non-Jury trial held in Wmspt on May 22, 1984 (Afternoon Session).

Oct. 4	102	ORDER—(1) pltfs' motion for atty's fees is denied w/o prejudice. (2) pltfs may within 30 days of issuance of mandate of Supreme Ct of US or Ct of Appeals for 3rd circuit, whichever occurs last, notify the ct that they request that their motion for atty's fees be deemed resubmitted or submit a new motion for atty's fees. (M) CC to counsel from Wmspt.
Oct. 5		UPDATED CERT CC OF PAGE 8 TO CT OF APPEALS.
Oct. 9	103	LETTER—to Clerk Mvros from Peter R. Maier, Dept. of Justice dated Sept 25, 1984 answering her letter to AUSA Nagle regarding the ordering of transcript, stating the entire transcript consisting of 4 days was requested, and that it is his understanding that some but not all of the transcript has been filed with the district court as of this date.
Oct. 9	104	MOTION—of plf to direct United States to pay for plaintiffs' copy of the trial transcript; and CERT.—of non-concurrence; and AFFI.—of Franklin A. Miles, Jr.; C of S.
Oct 9	105	BRIEF—of plf in support of Motion to direct United States to Pay for plfs' copy of the trial transcript; C. of S.
Oct 11		RECORD COMPLETE FOR PURPOSES OF APPEAL
Oct 11		CERTIFIED COPY OF DOCKET SHEET SENT IN LIEU OF RECORD ALONG WITH 2nd T/L.
Oct. 23	106	RESPONSE—of Fed. Deft's to pltf's motion to direct the U.S. to pay for cost of transcript. C of S.
Oct 25	107	LETTER—to Deputy Clerk in Wmst., Pa. from Gary S. Gildin, professor of law at the Dickinson School of Law dated 10/24/84 confirming that plfs will not be filing a reply brief concerning their motion to direct US to pay for plfs' copy of the trial transcript.

Oct 31	108	ORDER—IT IS ORDERED THAT: The United States shall pay the cost of preparing a copy of the trial transcript in this case for the plaintiffs. (M) Copy to counsel of record from Wm.
Nov. 21	109	NOTICE—from US Supreme Court that an appeal has been filed—their No. 84-780, October Term-1984. Heckler, appellant, vs. Ray et al.
Nov. 21	110	MOTION—of Deft. Walter Cohen to dismiss appeal not yet docketed, cert. of concurrence. C. of S.
Nov. 27	111	ORDER—upon motion of Walter Cohen, his appeal to US Supreme Court from this court's judgment entered on 6/23/84 is dismissed. (M) CC to counsel from Wmspt.
1985		
Jan 19	112	ORDER—from the Supreme Court of the United States, appeal from the United States District Court for the MD of Pa., The statement of jurisdiction having been submitted and considered by the Court, in this case probable jurisdiction is noted. The case is set for oral argument in tandem with No. 84-1097, Goldman v. Weinberger. Copy to Judge Muir.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

STEPHEN J. ROY AND KAREN MILLER, PLAINTIFFS

v.

WALTER COHEN, ET AL., DEFENDANTS.

Civil Action No. 83-1179

Complaint Filed August 17, 1983

(Judge Muir)

COMPREHENSIVE STATEMENT OF UNDISPUTED FACTS

Pursuant to Rule 408.3 of the Rules of Court of the United States District Court for the Middle District of Pennsylvania and Rules 5.15 and 5.306 of this Court's Order #3 of August 19, 1983, the parties, by their undersigned counsel, agree that the following facts are undisputed in this action:

1. Plaintiff Stephen J. Roy is a Native Abenaki.

2. Mr. Roy's great-grandfather on his father's side was a tribal chief in an Abenaki tribe.

3. Mr. Roy's grandfather on his father's side was a full blood Abenaki.

4. Karen Miller is the wife of Stephen J. Roy.

5. Stephen J. Roy and Karen Miller have two children, Renee, age five and Little Bird of the Snow, age three.

6. With the exception of Little Bird of the Snow, they all have Social Security Numbers.

7. Defendant Walter Cohen is Secretary of the Pennsylvania Department of Public Welfare ("DPW").

8. As Secretary, Defendant Cohen has overall responsibility for administration in Pennsylvania of the federal-state programs of Aid to Families with Dependent Children, 42 U.S.C. § 601 *et seq.* and Medical Assistance to families with dependent children, 42 U.S.C. § 1396 *et seq.* and of the federal-state program of food stamps to low-income households, 7 U.S.C. § 2011 *et seq.*

9. Defendant Margaret Heckler is Secretary of the United States Department of Health and Human Services ("HHS").

10. As Secretary, Defendant Heckler has overall responsibility for administration of the federal-state programs of Aid to Families with Dependent Children and Medical Assistance to families with dependent children.

11. Defendant John Block is the Secretary of the United States Department of Agriculture ("USDA").

12. As Secretary, Defendant Block has overall responsibility for administration of the federal-state program of food stamps to low-income households.

13. On January 1, 1982, Stephen J. Roy began receiving cash assistance and medical assistance for himself and his two daughters, Renee and Little Bird of the Snow.

14. This assistance was provided by DFW and HHS pursuant to the federal-state programs of Aid to Families with Dependent Children and Medical Assistance to families with dependent children.

15. On April 27, 1982, DFW advised Mr. Roy that he had failed to provide a Social Security Number for Little Bird of the Snow.

16. DFW stated that a Social Security Number is required by federal and state statutes and regulations as a condition of eligibility for assistance for Little Bird of the Snow.

17. Mr. Roy advised DFW that he would not provide a Social Security Number for Little Bird of the Snow, alleging that it was contrary to his religious beliefs as a Native Abenaki.

18. On September 17, 1982, Mr. Roy's cash assistance under Aid to Families with Dependent Children was reduced because DFW held Little Bird of the Snow ineligible for benefits.

19. Similarly, DFW discontinued medical assistance for Little Bird of the Snow.

20. The sole basis for these actions was Mr. Roy's refusal to obtain a Social Security Number for Little Bird of the Snow.

21. On June 16, 1983, DFW held a hearing on Mr. Roy's appeal from the reduction of cash assistance and discontinuance of medical assistance for Little Bird of the Snow.

22. On July 28, 1983, the DPW Hearing Examiner decided Mr. Roy's appeal and held that Mr. Roy's refusal to provide a Social Security Number for Little Bird of the Snow is based upon a religious belief that is sincerely held. She also found that DPW had a compelling state interest in requiring a Social Security Number for Little Bird of the Snow.

23. On July 28, 1983, the DPW Hearing Examiner decided that Mr. Roy's appeal be denied and refused to restore the cash assistance or medical assistance for Little Bird of the Snow.

24. DPW affirmed the order of the Hearing Examiner on July 29, 1983.

25. Except for his refusal to provide a Social Security Number for Little Bird of the Snow, Mr. Roy has met all the requirements for eligibility for cash assistance and medical assistance for Little Bird of the Snow at all times since January 1, 1982.

26. Mr. Roy continues to refuse to provide a Social Security Number for Little Bird of the Snow.

27. In September, 1982, Mr. Roy was denied $33 and, since October, 1982, Mr. Roy has been denied $66 per month as a result of DPW's discontinuance of Little Bird of the Snow from cash assistance.

28. Since September 17, 1982, Mr. Roy has paid $40.50 for medical and dental care for Little Bird of the Snow. If DPW had not discontinued Little Bird of the Snow from medical assistance, these expenses would have been paid by DPW and HHS.

29. Stephen J. Roy and Karen Miller have been receiving food stamps from DPW and USDA pursuant to the federal-state program of food stamps to low-income households.

30. On or about May 26, 1983, DPW advised Mr. Roy and Ms. Miller that it intends to discontinue food stamps for Little Bird of the Snow because they failed to provide a Social Security Number for Little Bird of the Snow.

31. DPW asserted that a Social Security Number is required by federal and state statutes and regulations as a condition of eligibility for food stamps for Little Bird of the Snow.

32. Mr. Roy advised DPW that he would not provide a Social Security Number for Little Bird of the Snow, alleging that it was contrary to his religious beliefs as a Native Abenaki.

33. Except for their refusal to provide a Social Security Number for Little Bird of the Snow, Mr. Roy and Ms. Miller meet all the requirements for eligibility for food stamps for Little Bird of the Snow.

34. Plaintiffs continue to receive food stamp benefits, but Pennsylvania has commenced proceedings for the discontinuance of such benefits if plaintiffs persist in refusing to provide an SSN for their daughter.

35. In 7 U.S.C. § 2025(e) and 42 U.S.C. § 602(a)(25), Congress has specified that households participating in the federal food stamp program and the Aid to Families with Dependent Children program furnish the Social Security Number ("SSN") of each member of the household.

36. Applicable regulations of both HHS and USDA (7 C.F.R. § 273.6; 42 C.F.R. § 232.10) reiterate that specification which has been followed by the State of Pennsylvania Department of Public Welfare.

37. The government requires a Social Security Number as a condition of receiving welfare benefits in order to prevent fraud.

38. The SSN is a tool of federal and state agencies to reduce program fraud and the misdirection of benefits in the food stamp and AFDC programs.

39. The magnitude of these programs requires the existence of computerized systems.

40. SSNs are used as a means of determining that benefits are properly paid, that there is no duplication of benefits or failure of payment and that each household member is properly identified for all proper administrative purposes.

41. SSNs thus provide a basis for differentiating among program recipients with the same or similar names.

42. SSNs serve this purpose well because they are generally unique identifiers.

43. The Social Security System has data on over 383 million accounts, and has processed over 14 million receipts in the AFDC program since August 1, 1975.

44. As of October 11, 1983, the computer system had a record of 55,036 persons with the name Roy, 32 with the name Stephen Roy. Plaintiffs object to the relevance of this fact.

45. The SSN has become an important part of the efforts of states to administer their welfare programs effectively through computerized record systems.

46. Such systems are a means of attaining greater accuracy in providing benefits and in reducing fraud in such programs and aid in coordination of information in various welfare programs to attempt to prevent recipients from receiving duplicate benefits.

47. Analyses done by HHS and USDA confirm that their exist significant fraud and overpayments in these benefit programs.

48. Even a small sample of studies by HHS indicate overpayment of $25 million on an annual basis, while USDA has estimated that, in fiscal year 1981, $1 billion in benefits were attributed to payments to persons ineligible for the program and overpayments to eligible persons.

49. The reliable use of computerized matching based upon SSNs can significantly reduce erroneous payments in these programs.

50. SSNs are important in these programs in implementing Congressional mandates with respect to wage matching, and are important for program "crossmatches" to verify other sources of income.

51. Requiring SSNs for children enhances the ability to detect nonexistent children on the basis of crossmatches with school enrollment and other files. Plaintiffs object to the relevance of this fact.

52. SSNs also are important in carrying out the WIN and Child Support programs, and the work registration and workfarce provisions of the food stamp programs. Plaintiffs object to the relevance of this fact.

53. The SSN requirement in the food stamp program also is important because a demonstration of eligibility for food stamps can affect a household's eligibility for benefits in six other nationwide meal programs administered by USDA.

54. Mr. Roy was and is required to provide his own Social Security Number as a condition for receiving the cash grant and medical assistance for Little Bird of the Snow.

55. Mr. Roy agreed to provide his own Social Security Number when he applied for the cash grant and medical assistance for Little Bird of the Snow and suggested this as an alternative to getting a Social Security Number for Little Bird of the Snow.

56. The Department of Public Welfare refused to accept this as an alternative.

57. Little Bird of the Snow's name and birthdate were entered into the computer which DPW and HHS use to determine eligibility for welfare benefits.

58. Mr. Roy and Ms. Miller are required to provide their Social Security Numbers as a condition of receiving food stamps for Little Bird of the Snow.

59. Mr. Roy and Ms. Miller provided their own Social Security Numbers when they applied for food stamps for Little Bird of the Snow.

60. Little Bird of the Snow's name and birthdate were entered into the computer which DPW and USDA use to determine eligibility for welfare benefits.

61. Mr. Roy and Ms. Miller continue to refuse to provide a Social Security Number for Little Bird of the Snow because they claim it would violate their religious beliefs.

62. The AFDC checks and food stamps received by all program participants are and would continue to be numbered. Plaintiffs object to the relevance of this fact.

63. Allowing applicants for benefits programs to raise "religious" objections to avoid providing needed information, such as SSNs, also would put program officials in the position of making determinations regarding the *bona fides* of the applicant's "religious" beliefs. Plaintiffs object to the relevance of this fact.

64. There have been four reported challenges to the Social Security Number requirement for welfare benefits based upon the contention that the number violates sincerely held religious beliefs of the welfare recipient.

/S/ Gary S. Gildin
GARY S. GILDIN
150 South College St.
Carlisle, Pennsylvania 17013
Telephone: (717) 243-4611

/S/ Franklin A. Miles, Jr.
FRANKLIN A. MILES, JR.
P.O. Box 1166
Harrisburg, Pennsylvania 17108

Attorneys for Plaintiffs

RICHARD K. WILLARD
Acting Assistant Attorney General

DAVID D. QUEEN
United States Attorney

HARRY A. NAGLE
Assistant U.S. Attorney
U.S. Post Office Building
Market Street
Lewisburg, Pennsylvania 17837
Telephone: (717) 524-4415

/S/ Lewis K. Wise
LEWIS K. WISE

/S/ Theodore C. Hirt
THEODORE C. HIRT

Attorneys, Department of Justice
Civil Division
10th & Penna. Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-4785

OF COUNSEL:
ELIZABETH A. ALLASEN
Attorney
Office of General Counsel
United States Department of Agriculture
Washington, D.C.

GWEN JONES
Attorney
Office of General Counsel
Social Security Administration
Baltimore, Maryland

Attorneys for Federal Defendants

/S/ Joel M. Ressler
JOEL M. RESSLER
Deputy Attorney General
Commonwealth of Pennsylvania
1545 Strawberry Square
Harrisburg, Pennsylvania 17120

Attorney for Defendant Walter Cohen

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

STEPHEN J. ROY, ET AL., PLAINTIFFS,

v.

WALTER COHEN, ET AL., DEFENDANTS.

Civil No. 83-1179
Complaint filed August 17, 1984
(Judge Muir)

AFFIDAVIT OF PHILIP HARANT
DIRECTOR OF THE DIVISION OF EARNINGS SYSTEMS
SOCIAL SECURITY ADMINISTRATION
DEPARTMENT OF HEALTH AND HUMAN SERVICES

State of Maryland)
) ss
County of Baltimore)

I, PHILIP HARANT, being first duly sworn, depose and say as follows:

1. I am the Director of the Division of Earnings Systems of the Social Security Administration of the Department of Health and Human Services. As such, I direct the design, programming, validation, and implementation of systems within the Division's areas of responsibility. The following information was provided by employees of this Division and such responses are true to the best of my information and belief.

2. Data processing is a series of planned actions and operations upon information to achieve a desired result. Regardless of the size, complexity, speed or cost of equipment or computer processing systems the steps are the same. The basic operations in processing data are (1) to originate data (2) to manipulate, according to some plan, the new data and files prepared in some earlier cycle, and (3) to report results.

3. The origination of data involves collection, conversion and verification. Collection is not in issue here. Conversion is the necessary step of transferring data into a machine readi-

able language. Data must also be verified to obtain a high degree of accuracy.

4. Conversion or presentation of data to a computer system is similar in many ways to communicating with another by letter. The intelligence to be conveyed must be reduced to a set of symbols. Communication with the computer system requires that data be reduced to a set of symbols that can be read and interpreted by data processing machines.

Computers function in binary states; this means that the computer components can indicate only two possible states or conditions. The binary states of operation of the components are signals to the computer, as the presence or absence of light from an electric light bulb can be a signal to a person. Representing data within the computer is accomplished by assigning or associating a specific value to a binary indication or group of binary indications. In a computer, the values assigned to a specific number of binary indications become the code or language for representing data. Because binary indications represent data within a computer, a binary method of notation is used to illustrate these indications. The binary system of notation uses only two symbols, zero (0) and one (1), to represent specific values. In any one position of binary notation, the 0 represents the absence of a related or assigned value and the 1 represents the presence of a related or assigned value.

The information or data fed into the computer system by an input device will be converted to, or symbolized in, electronic form. That is, regardless of the original form of the data, it will be codified into this numerical language used by the computer for data processing operations.

5. Verification involves the accuracy and completeness of the data input. Each transaction event requires, at minimum, these elements of data to describe it: (1) the identity of the party of the transaction; (2) the desired transaction; (3) validation symbols and (4) document identity. In the Social Security computer system, the identification of the transactor is imperative. The social security number system, designed over forty years ago, facilitates unique identification of transactors and is the cornerstone for Federal, State and private computer systems. The need for a unique identifier

is demonstrated by the fact that the Social Security system has data on over 193,000,000 accounts. Furthermore, in the AFDC program alone, 14,758,249 receipts have been processed since August 1, 1973.

6. A unique identifier, such as the social security number, facilitates data exchange and verification. Executive Order 9397 establishing the numbering System for Federal Accounts Relating to Individual Persons recognized both the need for an unduplicated numerical identification system of accounts and the probability of some data exchange. (A copy of Executive Order 9397 is attached.)

7. Without unique identifiers, transactors of the same name would present substantial problems to those working with the Social Security computer system. The name of the plaintiff can be used to illustrate the burden of attempting to process names rather than unique identifiers. As of October 11, 1963, the computer system had a record of 55,036 persons with the name of Roy, 32 with the name Stephen Roy.

8. In order for data to be usable by a computer it must be stored in the computer. Storage is somewhat like an electronic filing cabinet—completely indexed and instantaneously accessible to the computer. Each position or section of storage has a specific location or address so that stored data can be located as needed by the computer. Therefore, not only must all data be converted into the numerical language of the computer but it is also assigned a specific location in this same code.

9. In using the computer system to locate information on a particular transactor, all transactors must be represented in equal values or a commonality of symbols. These symbols are the unique identifiers. Without them, several additional searches or comparisons must be made of birth dates, parents' names, addresses, etc. Such additional comparisons of the total file of transactors negate the benefit of computers, that is the savings of time. The only other alternative is to establish a parallel system.

10. The Social Security Administration's computer based enumeration system resulted from extensive systems design and the formulation of implementation steps performed over a period of many years. A conservative estimate of resources

expended on the development and maintenance of this system is 50 man years each year for the last 10 years. The data collection, conversion and verification costs to assimilate prospective information into the Administration's basic files and to accomplish transactions on a daily basis numbering between 25,000 and 50,000 per day are approximately 350 man years each year. The transfer of massive amounts of data from paper files to an electronic medium took over 5 years and required approximately 1,800 man years each year on the average. In this transfer approximately 265,000,000 records were converted from paper form to magnetic tape.

The idea that an identifier other than one based on numbers, be substituted for the social security number on either an alternative or permanent basis would be both extremely costly to implement and inefficient. The cost of an alternate system is estimated to be in significant excess of $300,000,000 and was derived from a study performed to estimate the cost to reissue social security cards on tamperproof paper to all card holders. To accomplish a complete substitution would require several more steps and would therefore significantly exceed the $300 million figure. Furthermore, a different data construction would require a different filing system and processing instructions. Both systems would then need to be referenced and maintained increasing time, cost and inefficiency.

s/ Philip Harant
PHILIP HARANT
Director of the Division of
Earnings Systems
Social Security Administration
Department of Health and
Human Services

Subscribed and sworn to before me this 14th day of February, 1984.

s/ [Illegible]
Notary Public

My Commission Expires: July 11, 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

STEPHEN J. ROY, ET AL. PLAINTIFFS,

v.

WALTER COHEN, ET AL., DEFENDANTS.

Civil No. 83-1179
Complaint filed 8/17/83
(Judge Muir)

AFFIDAVIT OF HARRIS G. FACTOR
DIRECTOR OF THE OFFICE OF REGULATIONS
SOCIAL SECURITY ADMINISTRATION
DEPARTMENT OF HEALTH AND HUMAN SERVICES

State of Maryland)
) ss
County of Baltimore)

I, HARRIS G. FACTOR, being first duly sworn, depose and say as follows:

1. I am the Director of the Office of Regulations of the Social Security Administration of the Department of Health and Human Services (HHS). The Office of Regulations is responsible for the coordination of the Social Security Administration's litigation activities for the Commissioner of Social Security. The following information was provided by employees of the Social Security Administration and such responses are true to the best of my information and belief.

2. Section 402(a)(25) of the Social Security Act, 42 U.S.C. § 602(a)(25), requires "(A) that, as a condition of eligibility under the plan, each applicant for or recipient of aid [Aid to Families with Dependent Children] shall furnish to the State agency his social security account number (or numbers, if he has more than one such number), and (B) that such State agency shall utilize such account numbers, in addition to any other means of identification it may determine to employ in the administration of such plan."

Furthermore, implementing Federal regulations at 42 U.S.C. [sic] 202.10 provide in pertinent part, that if the applicant or recipient "cannot furnish a SSN (either because such SSN has not been issued or is not known), [he shall be required] to apply for such number through procedures adopted by the State or local agency with the Social Security Administration. If such procedures are not in effect, the applicant or recipient shall apply directly for such number, submit verification of such application, and provide the number upon its receipt . . . ."

3. In fiscal year 1981, there was an average of 3,871,000 families receiving AFDC payments each month. These families included an average of 11,160,000 persons of which 7,615,000 were children. Preliminary data for this same year show that approximately $7,826,000,000 in Federal funds was expended in funding AFDC programs in the States and other United States jurisdictions. Of this amount, $6,928,000,000 were expended for payments to recipients and $903,000,000 for administrative costs. The magnitude of this program requires a computerized system based on unique identifiers for the management of data concerning the recipients especially in light of the fact that this information is kept in the Social Security system which maintains approximately 203,000,000 accounts.

Creating an exception to the general statutory requirement that social security numbers be supplied for AFDC recipients would seriously interfere with AFDC program administration. Social security numbers are used in AFDC cases as a means of insuring that information available regarding an applicant's eligibility for assistance is used in making the determination that checks are properly paid, that there is no duplication of checks or failure of payment and that each recipient is properly identified for all proper administrative purposes. Because of duplication, names are not sufficient to insure that each recipient properly receives his or her check. Social security numbers serve this purpose well because they are unique identifiers.

4. P.L. 95-216 was enacted in 1977, requiring State welfare agencies to use wage information contained in State Employment Security files or Social Security Administration

records in determining AFDC eligibility and payment amounts beginning in October 1979. In order to comply with this law, it is essential that all AFDC recipients are assigned social security numbers. Part 401 of Title 20 of the Code of Federal Regulations was revised to comply with P.L. 95-216 by providing for the release of wage information by the Social Security Administration in response to requests by state AFDC agencies. The Wage Data Exchange provisions of P.L. 95-216 mandated that by October 1, 1979, States must request and use wage information available to them from the State Unemployment Compensation agency or, if not available, from the Social Security Administration. Assignment of social security numbers is also necessary to access wage information maintained by State Employment Security agencies and for the use of wage information by State AFDC agencies.

5. Two of the most widely used techniques in attacking fraud and waste in HHS programs are matches and sophisticated computer screening techniques. Matches involve the comparison of two or more computer files to determine the similarity or dissimilarity of data. Screens, on the other hand, look for patterns of behavior such as illogical relationships and prohibited practices. It is essential that unique identifiers be assigned to recipients for matches and screening to be undertaken.

6. Project Match, which was under the direction of HHS, Inspector General, was initiated in August 1977 after authorities in several areas of the country found cases where Federal employees had received welfare payments they were not entitled to. In 1977, Project Match-1 was undertaken to match Federal military and civilian rolls against State AFDC rolls. Initially, 26 States submitted tapes for this match, and 33,000 apparent matches were forwarded to the Federal agencies for submission of payroll data. Approximately 33 percent of these cases were found to be overpaid or ineligible. Interjurisdictional matches were also undertaken in 1977 to match tapes from participating States against each other in search of instances where individuals might be drawing grants from two or more jurisdictions. Of the initial 26 States which were matched in 1977,

9,000 individuals were identified as receiving duplicate welfare payments. A second interjurisdictional of all 50 States identified an additional 8,000 individuals.

7. In the Annual Report for 1978, the Office of the Inspector General estimated savings of $7.9 million for the reduced and terminated AFDC payments in the first 12 months following the Federal employee match and the jurisdictional matches.

8. In the Annual Report for 1979, the Office of the Inspector General reported the results of Project Match-III where only civilians hired by the Federal government since Project Match I were compared with the welfare rolls. Of the approximately 322,000 new hires, 6,000 individuals were identified as appearing on both rolls. Another interjurisdictional match was done in the summer of 1979 which compared the more recent State welfare rolls against each other. This match identified 2,544 individuals as recipients of AFDC in more than one State and also identified 920 individuals which had been discovered in the prior interjurisdictional matches. In 1979, the Office of the Inspector General estimated that the AFDC overpayments eliminated the Federal employee match and the interjurisdictional matches exceeded $11.6 million.

9. In the Annual Report for 1981, the Office of the Inspector General reported that the interjurisdictional matches for that year had identified 3,500 individuals receiving assistance in more than one location. Another pilot project utilizing social security numbers, labeled "Missing Kids," was undertaken, which identifies AFDC children who do not exist, or, if they exist, are not living in the AFDC family unit. The basis for the project was the assumption that children between the ages of two and sixteen years will receive some kind of medical care within the previous two years. Since AFDC recipients are also eligible for Medicaid, the Medicaid record should show some utilization for that period. If the AFDC children did not receive medical services under Medicaid, the school attendance records were then checked.

10. Aside from employment files, welfare rolls, medicaid files and school records, States have utilized social security

numbers to match AFDC recipient rolls to data exchanges on births, deaths, marriages and bank accounts, as well as automated motor vehicle registration files and the United States Department of Agriculture food stamp rolls.

11. In 1982, auditors in the Office of the Inspector General developed computer analysis routines, called "screens," for use by the States in checking on the validity of AFDC payments. These screens were used to scan the AFDC eligibility files for cases having duplicate social security numbers as well as duplicate birth dates and concurrent payments. When these screens were introduced initially in two States, 3,800 cases where SSN's were duplicated were detected and 88 pairs of cases where more than one AFDC assistance payment was made concurrently on behalf of the same recipient.

12. In 1983, the Office of the Inspector General designed two computer programs called "Project Clean Data" to assist State and Federal agencies in identifying social security numbers which have not been issued or are being used fraudulently. The programs were distributed to more than 60 agencies in 40 States and to several Federal agencies. Many States have reported thousands of incorrect SSN's in their data file and SSNs being used fraudulently.

13. The Semi-annual Report of the Office of the Inspector General for October 1, 1982 through March 31, 1983, describe procedures which were undertaken to identify AFDC recipients who were converting to Supplemental Security Income (SSI) and receiving concurrent payments during the conversion process. The problem was caused principally by incorrect termination payment dates submitted by the States. The Inspector General's Office estimated that matching the AFDC and SSI rolls for such conversions would save $2.5 million annually.

14. In 1983, the Office of the Inspector General discovered the problem of certain States maintaining separate systems for AFDC eligibility and for AFDC payments which allows recipients to be closed on the "eligibility" file without their payments being terminated by notation on the "payments" file. The Inspector General developed a file/payment file match which matches a State's AFDC "eligibility" file to its AFDC "payment" file and identifies payments to individuals

who were either closed on the "eligibility" file or were never eligible for AFDC assistance. The Inspector General's Office estimated that such improper AFDC payments totaled approximately $3.4 million in 1982.

15. Many states, including Pennsylvania, are using computerized systems in the administration of their welfare programs. Such systems insure greater accuracy in sending checks and aid in reducing fraud. Such systems will aid in coordinating information in various welfare programs to insure that recipients are not on more than one welfare roll. They are also effective in coordinating with related welfare programs such as medicaid. In order to effectively centralize and mechanize the state welfare system, it is necessary to assign a unique number to all recipients and that all recipients have the same type of number.

16. In addition, social security numbers are essential to facilitate communication and interrelationships among service programs under Title IV of the Social Security Act as in the WIN program, Part C of Title IV, 42 U.S.C. §§630 *et seq.*, and the Child Support Program, Part D of Title IV, 42 U.S.C. §§651 *et seq.* Briefly stated, the WIN program is a work incentive program designed to provide work and training opportunities to persons on welfare so that these individuals can become independent members of the labor force. The program requires the enrollment of certain members of an AFDC family in job training and employment programs. These members include, but are not limited to, parents, adult family members whose presence in the home is not needed to care for children, and children and other relatives between the ages of 16 and 19 who are not in school or working. It is axiomatic that the possession of a social security account number is necessary for long-term, permanent employment in the private sector. This is the aim of the WIN program.

Under WIN, children in AFDC families who are 16 but under 19 and not a full-time student in an elementary or secondary school can be required to register for and be enrolled in a job program. The possession of a social security account number is a prerequisite for employment. To require this efficient means of administration to be utilized only for the

parents and no other members of the family would leave children disadvantaged in accessing the work force.

17. Another program for which a social security number is required is the Child Support Program, 42 U.S.C. §§651 *et seq.* Briefly stated, this program is designed to trace absent parents so that such parents can contribute to the support of their children. One of the aims of this program is that states and local law enforcement agencies be given the aid and assistance of the Department of HHS, Justice, and the Internal Revenue Service (IRS) of the Department of the Treasury to trace absent parents or other legally responsible persons and have them contribute to the support of their dependent children or wards. The development since 1960 of the virtually universal use of social security account numbers by many private and public organizations as an essential and indispensable part of their record system is a factor which Congress considered in mandating use of social security numbers in the AFDC program. Their use makes coordination with other government agencies possible.

The Federal Parent Locator Service processes requests for information from states which have been unable to locate parents. In fiscal year 1982, the Service processed 213,461 requests with known social security numbers and was able to furnish addresses to the states in 70% of the cases. Of the 19,636 requests without known social security numbers processed that year, addresses could be obtained in only 41% of the cases.

18. If plaintiffs prevail in this action, the development of a special system of identification for plaintiff's child would be both duplicative and wasteful. To develop a special system of identification for a large number of people would create confusion and would be virtually unworkable. Furthermore, it would defeat the purposes which the use of social security numbers were intended to serve. Such an alternate system would lead to wasteful administrative procedures which result in duplication of effort and a lack of, if not absence of, coordination with other programs and other agencies with related goals and functions, delays in determining eligibility, and uncorrected misreporting of income of recipients.

Furthermore, if plaintiffs prevail in this action and a social security number is not assigned to their child, their child will still not escape numerical labeling. A separate system must be devised to control the information concerning plaintiff's child and her benefits. Since the entire AFDC program is computerized on a numerical basis this separate system must be numbered in some manner. A welfare identification number or a numerical locator for the information storage will be necessary. Also, all forms filed by plaintiff and all grant checks released will be numbered.

19. The potential for duplication of names in a State the size of Pennsylvania makes it obvious that some type of enumeration is absolutely vital for the welfare system to function in delivering cash and services as quickly and accurately as possible to the proper recipients. The law imposes on the Secretary of Health and Human Services an obligation to assign a social security number to every recipient served by the programs involving federal funds. She has no authority to grant an exception to some recipients with regard to enumeration. Furthermore, the issuance of a social security number is a service to an AFDC recipient as it facilitates identification for many purposes other than the receipt of assistance.

/s/ _____
HARRIS G. FACTOR
Director of the Office
of Regulations
Social Security Administration
Department of Health and Human
Services

Subscribed and sworn to before me
this 14th day of February, 1984

/s/ [Illegible]
Notary Public

My Commission Expires: July [ ], 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

STEPHEN J. ROY, ET AL., PLAINTIFFS,

v.

WALTER COHEN, SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, ET AL., DEFENDANTS

Civil Action No. 83-1179
Complaint filed August 17, 1983
(Judge Muir)

**DECLARATION OF VIRGIL CONRAD
DEPUTY ADMINISTRATOR OF THE
FAMILY NUTRITION PROGRAMS
FOOD AND NUTRITION SERVICE
UNITED STATES DEPARTMENT OF AGRICULTURE**

I, VIRGIL CONRAD, declare as follows:

1. I am the Deputy Administrator for the Family Nutrition Programs of the Food and Nutrition Service (FNS) of the United States Department of Agriculture (USDA). I am personally familiar with the facts stated in this declaration. As Deputy Administrator, I have general oversight responsibility for the Family Nutrition Programs, which include the Food Stamp Program.

2. Section 16(e) of the Food Stamp Act of 1977, 7 U.S.C. §2025(e), provides that "[t]he Secretary and State agencies shall (1) require, as a condition of eligibility for participation in the food stamp program, that each household member furnish to the State agency their social security account number (or numbers, if they have more than one number), and (2) use such accounts numbers in the administration of the food stamp program."

Federal regulations implementing this requirement, 7 CFR 273.6 (47 Fed. Reg. 53309, Nov. 26, 1982), state that "[t]he State agency shall require that a household

participating or applying for participation in the Food Stamp Program provide the State agency with the social security number (SSN) of each member or apply for one before certification." 7 CFR 273.6(a). The regulations further provide that "if the State agency determines that a household member(s) required to provide an SSN as a condition of eligibility has refused to provide it, then the individual without the SSN shall be ineligible to participate in the Food Stamp Program." 7 CFR 273.6(c). Earlier, the regulations state: "[t]he member that has applied for an SSN shall be allowed to participate [in the Food Stamp Program] for 30 days from the first day of the first full month of participation while awaiting receipt of the SSN." 7 CFR 273.6(a).

3. In fiscal year 1982, there was an average of approximately 20 million persons receiving food stamps each month and approximately $11 billion in Federal funds were expended in the food stamp program for the year. Of this amount, approximately $600 million were expended for administrative costs. The magnitude of this program requires a computerized system based on unique identifiers for the management of data. The social security number is an essential tool in the effort of USDA, states and localities to administer the food stamp program.

4. Creating an exception to the general statutory requirement that social security numbers be supplied for all household members would seriously interfere with food stamp program administration. Social security numbers provide a means of insuring that information available regarding an applicant's eligibility is used in making the determination that benefits are properly paid, that there is no duplication of benefits or failure of payment and that each household member is properly identified for administrative purposes. Because of duplication, names are not sufficient to insure that each household properly receives its benefits. SSNs provide an essential basis for differentiating among program recipients with the same or similar names. SSNs serve this purpose well because they are unique identifiers.

5. SSNs also play an important role in limiting fraud, waste and abuse in the food stamp program. In fiscal year 1981, an estimated $1 billion were attributed to payments to

persons ineligible for the program and overpayments to eligible persons. Inaccurate or insufficient income reporting is a significant factor in these figures. In 1981, insufficient or inaccurate income data was estimated to have resulted in approximately 20 percent of the number of food stamp quality control errors. Reliable use of computerized matching based upon SSNs can significantly reduce erroneous payments as well as improve program credibility. In addition, the mere fact of requiring SSNs can have a deterrent effect, discouraging the false reporting of income information through the prospect of easier verification of such data.

6. The total impact of fraud, waste and abuse in the food stamp program on both the federal government and the states is magnified by the use of food stamp eligibility as an element in the provision of other benefits. In the National School Lunch, Special Milk, School Breakfast and Child Care Food programs, demonstration of a household's participation in the food stamp program is considered adequate confirmation of the household's income level as stated on the program application, precluding further income verification. 42 U.S.C. §1758(b)(2)(C). In many states, food stamp program participation is a basis for receipt of various USDA commodities, such as surplus cheese and butter, which are being distributed to needy persons for household consumption. Another commodity program, the Commodity Supplemental Food Program, bases participation on evidence of eligibility for food stamps. 7 CFR 247.7(a)(2). These programs represent an additional $3.8 billion in benefits for fiscal year 1982, part of which were expended on the basis of an initial determination of food stamp eligibility.

7. Many states, including Pennsylvania, are using computerized systems in the administration of their welfare programs. Such systems insure greater accuracy in providing benefits, aid in reducing fraud and assist in coordinating information in various welfare programs to insure that recipients are not obtaining the same benefits in several jurisdictions. They are also important in coordinating with related welfare programs such as AFDC which rely on SSNs for identification. In order to effectively centralize and mecha-

size state welfare systems, it is necessary to assign a unique number to all recipients and to assure that all recipients have the same type of number. States also rely on SSNs to match food stamp recipient rolls to employment information, data exchanges on births, deaths, and marriages, motor vehicle registration files, and school records. Requiring SSNs for children aids in the detection of nonexistent children on the basis of cross matches with school enrollment files.

8. SSNs are also essential in carrying out the intent of work registration and workfare in the food stamp program. Section 6(d) of the Food Stamp Act of 1977 (7 U.S.C. §2015(d)) provides, subject to certain exceptions, that no household is eligible to receive food stamps if it includes "a physically and mentally fit person between the ages of eighteen and sixty" who refuses to meet various work registration requirements. These requirements are aimed at encouraging and aiding food stamp participants in finding jobs. Requiring SSNs for all program participants, many of whom are subject to work registration, is consistent with this goal since the possession of a SSN is generally a prerequisite for employment.

Section 20 of the Food Stamp Act of 1977 (7 U.S.C. §2029) authorizes any political subdivision in any state to operate a workfare program requiring certain household members to perform work as a condition of receipt of food stamp benefits. Workfare is designed to provide work and training opportunities to persons receiving food stamps so that these individuals can become independent members of the work force. Like work registration, the ultimate goal of workfare is permanent employment, for which a SSN is necessary. Although the work registration and workfare aspects of the food stamp program do not apply to all recipients, it would be administratively so cumbersome as to be impossible to administer a program which selectively required SSNs of only those persons likely to be subject to work registration and workfare requirements.

9. In addition, SSNs are necessary to carry out a congressional mandate with respect to wage matching. Public Law 97-98, enacted December 22, 1981 (codified at 7 U.S.C. §2025(e)(2)), requires state agencies which administer the

food stamp program to request and utilize information from state unemployment compensation agencies or the Social Security Administration in the certification of households. The SSN is essential for program cross matches to verify alleged sources of income such as unemployment compensation and AFDC payments and to detect unreported resources and income and/or improper multiple payments. Without the SSN, such matching activities would be impossible to perform. In the event program officials are unable to use SSNs, matching activities would require manual cross matching, a process which is unreliable and cumbersome.

10. States' need for the cross match information gained through the use of SSNs is heightened by the provisions of Section 16 of the Food Stamp Act of 1977 which requires the Secretary of Agriculture to reduce the federally funded portion of administrative costs when a state's payment error rate exceeds a certain level. 7 U.S.C. §2025(a)—(d). The payment error rate reflects the amounts of benefits which are either paid to households which don't meet basic program eligibility requirements or are overissued to households. SSNs, as integral elements of the cross matching process, are thus essential to the states in meeting the payment error rate limit set by statute and avoiding penalties in the form of decreased federal administrative funding.

11. If plaintiffs prevail in this action, the development of a special system of identification for plaintiffs' child would be required. Such a system would be both duplicative and wasteful. To develop a special system of identification for a large number of people would create confusion and would be unworkable. Furthermore, it would defeat the purpose which the collection of social security numbers in the Food Stamp Program is intended to serve. Such an alternate system would lead to wasteful administrative procedures which would result in duplication of effort, lack of coordination with other programs and agencies with related goals and functions, delays in determining eligibility, and uncorrected misreporting of income of recipients.

12. Allowing food stamp applicants to raise "religious" objections to avoid providing needed information, such as SSNs, would also put USDA and state officials in the posi-

tion of making determinations regarding the *bona fide* nature of each applicant's asserted "religious" beliefs, creating a still greater administrative burden.

13. In any case, if plaintiffs prevail in this action and a SSN is not required to be obtained by plaintiffs' child, she will still not escape numerical labeling. A separate system would have to be devised to control the information concerning plaintiffs' child and her benefits. Since the entire food stamp program is computerized on a numerical basis, any separate system would have to be numbered in some manner. A welfare identification number of a numerical locator for the information storage would still be necessary. In addition, the SSN requirement is not the only part of the food stamp program making use of numbers for identification. Each household applying for food stamps in Pennsylvania is assigned a case file number (currently the head of household's SSN) for identification purposes and the food stamps themselves are sequentially numbered rendering the food stamps unique to each participating household, much like the numbering system on traveler's checks.

14. Considering the size and complexity of the food stamp program, there are no practical alternatives to the SSN requirement which would avoid numerical identification of individuals seeking special treatment while accomplishing the goals of an effective program.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Virgil Conrad
VIRGIL CONRAD
Deputy Administrator
Family Nutrition Program
Food and Nutrition Service
U.S Department of Agriculture

EXECUTED ON: FEB 22, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CA No. 83-1179

STEPHEN J. ROY AND KAREN MILLER, PLAINTIFFS

vs.

COHEN, WALTER, SECRETARY OF THE PA. DEPT. OF PUBLIC WELFARE; HECKLER, MARGARET, SECRETARY OF THE U.S. DEPT. OF HEALTH AND HUMAN SERVICES; AND BLOCK, JOHN, SECRETARY OF THE U.S. DEPT. OF AGRICULTURE, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, DEFENDANTS

BEFORE: Honorable Malcolm Muir
PLACE: Williamsport, PA
PROCEEDINGS: Non-jury trial
DATE: Thursday, May 17, 1984

---

[2] (Court convened at 10:00a.m.)

* * * * *

[4] MR. GILDIN: Your Honor, once again, my name is Gary Gildin, and together with my co-counsel, Frank Miles, we represent the plaintiffs in this case, Stephen Roy, who's in the court room here today, and his wife, Karen Miller, the parents of Little Bird of the Snow Roy.

THE COURT: Is the wife here?

MR. GILDIN: She is taking care of the kids, Your Honor. Little Bird of the Snow is three years old.

THE COURT: Is Little Bird of the Snow going to appear at all?

MR. GILDIN: At present, there would be no intent. The concern was that, as a three-year-old, there might be some

problems with respect to court room decorum and the like. We had some problems at the hearing with respect to that.

THE COURT: I see.

MR. GILDIN: Your Honor, this case presents the [5] issue of whether or not the government lawfully may terminate welfare benefits solely because Mr. Roy and Ms. Miller refused to provide a Social Security number for their three-year-old daughter, Little Bird of the Snow. They refused to do so because it is contrary to their sincerely held religious beliefs.

THE COURT: What is that religious belief? Does it have a denominational name of any sort?

MR. GILDIN: The belief is founded, as the evidence will show, in the traditions and to the extent there is a religion—and you'll hear why American Indians do not draw that distinction between the traditions and religious beliefs of native American Indians in general, and Mr. Roy will expound upon his precise basis of that belief as a native Abenaki Indian.

* * * * *

It's undisputed, Your Honor, that on September 17, 1982, the Pennsylvania Department of Public Welfare terminated cash assistance and medical assistance benefits for Little Bird [6] of the Snow solely because of the failure of Mr. Roy and Ms. Miller to provide a Social Security number for her.

It's undisputed that, save for the Social Security number requirement, they are entitled to these benefits. The particular cash assistance and medical assistance were given pursuant to the federal and state programs of Aid to Families with Dependent Children and Medical Assistance to Families with Dependent Children, administered jointly by the Pennsylvania Department of Public Welfare and the United States Department of Health and Human Services.

It's undisputed that Defendant Cohen is the Secretary of the Pennsylvania Department of Public Welfare and as such has responsibility for administration of these welfare programs on behalf of the Commonwealth of Pennsylvania. It's also undisputed that Defendant Heckler is the Secretary of the United States Department of Health and Human Serv-

tres and has responsibility, on behalf of the federal government, for administration of those two programs.

The plaintiffs have sued Mr. Cohen and Ms. Heckler, both in their official capacities as secretaries of their respective departments and in their individual capacities apart from their office, seeking several forms of relief.

THE COURT: How is Ms. Allaben's client, Block, involved?

MR. GILDIN: Your Honor, we have a separate claim [7] based upon receipt of food stamps, which the government has expressed its intent to terminate but has not yet terminated those benefits. We have here two separate categories: The medical assistance and cash assistance, which have already been withdrawn in September of '92; and last May of '93, they've expressed their intent to terminate food stamps for the very same reason, solely because of the Social Security number.

Efforts have been begun to terminate those. They presently, however, are still being received by the plaintiffs on behalf of their daughter, but they've not abandoned their efforts to stop those; and indeed, that's one of the forms of relief. So, we have two separate counts based upon the type of benefits.

We've sued Defendants Cohen and Heckler asking, first of all, for a permanent injunction to enjoin the continued termination of these benefits based upon the failure to provide the Social Security number. We've also asked that all cash assistance and medical assistance withheld to date be restored, and there indeed is no dispute as to those amounts. In September of 1992, $33.00 were withheld. Each month since October of 1992, $66.00 were withheld, and Mr. Roy had to spend $40.50 in medical assistance for Little Bird of the flour, which everyone agrees would have been paid by these defendants, had she not been terminated from the medical assistance program.

We are also here seeking other damages caused by [8] the violation of plaintiffs' constitutional rights; and finally, we have sought a preliminary injunction to restore all benefits withheld and to continue receipt of these benefits pending a decision on the merits. Now, Your Honor—

THE COURT: Now, it seems to me we ought to wrap this all up in one trial. Is there any reason why that cannot be done?

MR. GILDIN: Indeed, Your Honor, by your Order of May 9, 1984, you consolidated the preliminary injunction motion hearing with this trial, and we're prepared at this point to try this case fully on the merits. The only reason we would continue to ask for preliminary injunctive relief is that if this Court anticipates a significant delay in issuing its decision on the merits, we would continue to pray that the injunction issue immediately to allow these benefits to be restored pending that decision; but procedurally, we've prepared and anticipate putting on the complete trial.

THE COURT: Well, we find that it's difficult to get out a decision where we try a case sitting without a jury with tremendous rapidity because we go through many drafts of findings of fact. For instance, I'm working on one right now where I'm on my fifth set of revisions of findings of fact and about the second or third revision of the opinion, and then there's tremendous typing and comparing problems. So, I would think that we would do well to get a decision out in a month, [9] but we will certainly make every effort to try to do that. The one I'm working on right now, I believe we've been working on since the middle of April, and we just can't get it out.

MR. GILDIN: We understand that, Your Honor, perfectly, and that's why we submit that at least the preliminary injunction, while not affecting how this trial is going to proceed, retain some vitality for those purposes.

THE COURT: Well, if we could get a decision out within a month of the close of the trial, do you think we need any preliminary injunction?

MR. GILDIN: I'd have to defer to Mr. Roy. Can you make it another month without—

THE COURT: Well, I think you can talk that over with him.

MR. GILDIN: Okay, thank you. Now, in addition to the medical assistance and cash assistance claim, Little Bird of the Snow has been receiving food stamps pursuant to a different welfare program, the federal-state program of Food

Stamps to Low Income Households. On behalf of the state, this like other programs, is administered by the Department of Public Welfare, but the federal government administers it through the United States Department of Agriculture.

On or about May 26, 1983, the Department of Public Welfare advised the plaintiffs that they were going to terminate Little Bird of the Snow from food stamps, again solely because [10] of the failure to provide a Social Security number for her. No dispute here: Defendants concede that she is otherwise eligible for this program. As I've just mentioned, she is still receiving the stamps, although the defendants have not abated in their efforts to terminate her from this program.

It's undisputed that Defendant Cohen is responsible for the administration of this program on behalf of the Commonwealth of Pennsylvania and Defendant Block is responsible for the federal government for administration of this program; and therefore, we have joined Mr. Block as a defendant, seeking a permanent injunction to restrain the termination of these food stamps solely because of the failure to provide a Social Security number, as well as seeking preliminary injunctive relief against both Mr. Block and Mr. Cohen to prevent the termination of these benefits pending this trial.

Now, Your Honor, we think it's important to understand what this case is not about. Again, there's no question of the eligibility of Little Bird of the Snow for these benefits apart from the failure to provide the Social Security number for her. They meet the need requirements, they meet the dependency requirement, they meet all other eligibility requirements, save for their refusal to provide a Social Security number for her.

Similarly, this case is not a general challenge to the ability of the government to generally require a Social Security number. Other persons have attempted to challenge this [11] requirement on grounds that it invades privacy, and the problems with such claims is that anyone could come in and say, Well, I don't want to provide my number either because it similarly invades my rights to privacy shared by the general citizenry.

Rather, the claim here is simply to require this individual to provide a Social Security number for Little Bird of the Snow based upon this family's own religious beliefs.

THE COURT: What suggestion do you have as to how the needs or reasonable needs of the defendants can be accomplished?

MR. GILDIN: Well, Your Honor, first of all, our contention is that the reason for this number, regardless of the various labels that the government will place on this, is to prevent fraud or prevent overpayment of benefits; and the law is quite clear that, unless there's a perceived, widespread potential for fraud if one person is exempted, that that alone is not even the reason to continue the requirement at all. Indeed, here it's been undisputed that there are only four other cases reported out of the millions of welfare recipients where they've raised any challenge on the basis of a religious requirement and none based upon a native Abenaki American Indian coming in. So, regardless of the existence of any alternatives, their existence is inadequate. Nonetheless, this case is even easier.

THE COURT: Well, I'm troubled by that because: How are the going to keep any records at all? What is your [12] suggestion?

MR. GILDIN: Well, Your Honor, we have two suggestions that have not even been considered, as the evidence will show; that Mr. Roy was told that this is what the law requires and that no one had any discretion to eliminate or abrogate the requirement.

THE COURT: That may well be true, or at least they don't think they have any.

MR. GILDIN: He has suggested at all times that he will provide his Social Security number and his wife will provide her Social Security number, which could be used for Little Bird of the Snow. As the evidence will show that Mr. Roy obtained this number before he, as he will tell you, became aware of his particular religious beliefs, and he'll explain how this process of becoming aware is a gradual process; and so, he was willing to provide his number.

In other cases, this certainly has not found to be a bar to the sincerity of the religious beliefs. In the two other cases

that have dealt generally with this issue, Stevens versus Berger and Callahan versus Woods, the parents there also had a Social Security number before they became aware of their religious beliefs, and the court had no difficulty in finding those beliefs to be sincere and religious in nature.

He always offered to provide his number to be used to identify Little Bird of the Snow, which would be able to be [13] placed in the government's computer system and be able to identify her as a member of the family.

THE COURT: Well, I'm troubled by that because I'm not convinced at the moment that if you use Mr. Roy's Social Security number, you're going to be able to have it processed properly.

MR. GILDIN: Well, Your Honor, our understanding from Mr. Harant's affidavit submitted as a pre-trial matter is that the system works off of putting in numbers, although not exclusively so, and the only difference would be that if they put in Mr. Roy's Social Security number, they would get information about Mr. Roy as well as his daughter, Little Bird of the Snow.

THE COURT: There may be edits built into this computer system which would kick out the checks as excessive.

MR. GILDIN: Well, Your Honor, there's been no evidence of that to date, no evidence that that would be problem yet.

THE COURT: Well, we'll find that out.

MR. GILDIN: Secondly, Your Honor, we've suggested that—

THE COURT: Let me tell you this: I recently tried a case entitled Cole versus Mazurkiewicz, which had to do with the length of hair permitted inmates in male institutions in the commonwealth, penal institutions; and he was a Cherokee.

[14] In that case, we concluded the trial on April 17th, and we desparately tried to get the decision out, and we got it out on May 15th. So, that's—it's now Cole versus Fulcomer. There's been a new defendant substituted. But that gives you the idea that we certainly can't get this out within a month probably, but we'll try to meet that goal.

MR. GILDIN: Well, the first alternative, as I've suggested—which he suggested all along and no one has ever

explained to him what's wrong with that—is using his number. There's a second alternative, which is apparently what's been happening with respect to Little Bird of the Snow when she was on cash assistance and medical assistance and which is happening right now with respect to the food stamps that she continues to receive: and that is to use her name as part of the identification, her name, Little Bird of the Snow Roy.

You'll hear evidence today, based upon Mr. Harant's affidavit, that the computer system, which the government says is really the reason they need this identifier, accepts names and that you could put in indeed Little Bird of the Snow's name and birthdate; everyone agrees they have already been put into this computer, and one can then search by name rather than number. The complaint lodged by the defendant is: Well, names are generally not unique. Well, we've been trying to find out if there is more than one Little Bird of the Snow Roy on the computer. The government has told us that there are 32 Stephen [15] Roys, displaying their capacity to identify names; but to this date, they've never been able to tell us whether there is more than one Little Bird of the Snow Roy on that computer.

Furthermore, even should there be—let's accept their number—32 Little Bird of the Snow Roys, Mr. Harant's avvidavit [sic] —

THE COURT: Wait a minute. I thought there were 32 Stephen Roys.

MR. GILDIN: Right, exactly, and I'm saying: In the worst case, that there would be 32 Little Bird of the Snow Roys—and we contend that in the absence of evidence, the inference is quite clear that there's only one—but should there be two or three or ten or thirty, it's pretty much like Lexus works, Your Honor. If we put in 32 cases, Roy versus Cohen, and we were looking for this case, what we'd have to do, you'd have to do a second search saying: I also want to know now when was the case decided; I want the case in May of 1984.

And the government says that that's right. What you'd have to do is put in another search, for example, of birthdates; and what they complain about, as Mr. Harant's affida-

vit makes clear, is that it negates the savings of time performed by computers. It's the need to do the second search which apparently is the crux of their argument.

We have an expert witness here today, Mr. Richard Wood, who's the director of computing facilities at Gettysburg [16] College, who has carefully reviewed Mr. Harant's affidavit, which says quite plainly that computers, regardless of their size and complexity, all work the same way as far as putting information in and taking it out; and Mr. Harant's affidavit confirms that you can get this information out of the computer, and the complaint there is that, if it's not unique, you'd have to make this second search that we're talking about; and Mr. Wood is prepared to testify that that second search, Your Honor, would take at the outermost somewhere in the range of seven seconds.

THE COURT: Seven or seventy?

MR. GILDIN: Seven seconds. Again, Your Honor, it's like Lexus. If you get 32 cases, Roy versus Cohen, and you're looking for the unique case, you put the date in; and again, all of this assumes—and we'll see what the government has to offer here today—that there is more than one Little Bird of the Snow Roy.

They're able to tell us how many persons with the last name Roy there are, they're able to tell us that there are 32 Steve Roys, not even looking for Stephen J. Roy; but to date, they have not informed us that there is more than one Little Bird of the Snow Roy. Again, even if there were more than one, that's not an obstacle. It requires them to spend another seven seconds perhaps to identify it.

THE COURT: I know nothing about Lexus because I [17] don't have that available to me. I realize you do and many lawyers do, but the government hasn't the funds, apparently, to provide us with that. We can use it remotely by going through some library in Pittsburgh, but it's not of much practical value to us, and it certainly hasn't given me any knowledge of how computers work.

I know a little bit about it because of the case I just mentioned that I'm working so hard on the facts on that beginning February 17th.

MR. GILDIN: Your Honor, hopefully—and I probably share your knowledge or lack of knowledge of computers—that Mr. Wood will explain for all of our benefits how you simply provide the second search request, and it searches the 32 files and says: Well, which of those files has the birthdate, for example, January 1, 1984. It's simply a process of narrowing, and it's the second process that Mr. Wood will tell you that takes such little time.

The government sees this as defeating the purpose of the computers, the savings of time; and that inconvenience has repeatedly been held—if it is even an inconvenience at all—not to be the sort of interest that allows one to trample upon the free exercise of religion.

THE COURT: You mentioned that Dr. Wood or Mr. Wood would testify a certain way. It would seem to me that we would like to—we would try to avoid any anticipatory rebuttal. I [18] would think that what we ought to have is a statement by the—or evidence by the defense as to why they can't do such and such, and then hear rebuttal to that, rather than getting into it in the first instance.

I'm not ruling on that, but that's a problem, it seems to me.

MR. GILDIN: I would certainly agree, from a logical standpoint, Your Honor, that that would be the way to proceed. Our problem is, with respect to Mr. Wood having to come up here all the way from Gettysburg and take time away, and he's also accommodated us, as Mr. Roy's attorneys, by staying on call as to when, in fact, this case would be called. I was able to tell him, fortunately, that definitely Thursday would be a possibility. He's made extra efforts to accommodate his schedule because he's the only person in charge of their computing system. So, we would hope that the Court could get him on today as part of our case in chief only because his schedule only permits him to do so.

THE COURT: All right. Well, we'll meet that when we get to it, but we generally avoid taking any anticipatory rebuttal.

MR. GILDIN: Thank you. Your Honor, again, this case involves the question as to whether requiring this person to provide the Social Security number for his daughter would,

in fact, impede the government's ability to serve its more [19] general purposes.

The question is not: Is the Social Security number generally beneficial? We don't contest that; but what would be the consequences of exempting this one person, particularly since requiring them to provide the number would put them to the choice of foregoing these benefits, which is the choice they will exercise, as a cost of the exercise of their religious beliefs, which in our view would violate the First and Fourteenth Amendments to the United States Constitution; it would also violate the equal protection components of the Fifth and Fourteenth Amendment to the Federal Constitution; it would violate federal statutes that expressly prohibit discrimination on the basis of religion or national origin in the awarding of benefits; and because Mr. Roy is a native American Indian of the Abenaki tribe, it would also violate the American Indian Religious Freedom Act. Your Honor, this act sets forth as a policy of this nation the protection and preservation for American Indians of the right to believe, the right to express and the right to exercise their traditional religions.

Now, admittedly, these general purpose are encompassed by the First Amendment but congress saw fit in a special statute codified at 42 United States Code, Section 1996, to directly deal with these religious beliefs of the American Indians; and they did so based upon the unfortunate history in this country of infringement of the religious rights of native [20] American Indians through ignorance, occasionally through insensitivity and frequently because non-Indian officials perceived that because these native beliefs were different than what they viewed as religion that they did not have the status of a real religion; and congress' special policy as set forth in that preamble is implicated here.

Your Honor, we must prove in this case: First, that Mr. Roy's belief is religious in nature; and secondly, that it is sincerely held. The burden then shifts to the defendants to prove, first of all, a compelling interest, not the weighing standard that Mr. Hirt suggests in his brief, but the compelling interest in requiring this individual to provide the number.

Again, it's not enough that they rely on general statements of how important the Social Security number is to the welfare system as a whole, but rather what would happen if we exempted this one individual or attempted to accommodate this one individual. Secondly, even if they are able to prove that it's compelling—and again, based upon the notion that this all fits into a general category of fraud—they must also prove that there is no less restrictive alternative; there is no means other than requiring a number for Little Bird of the Snow that their interests may be protected.

Now, with respect to the religion issue, the evidence will show that indeed Mr. Roy's belief is religious in nature. It is undisputed that Mr. Roy is a native American [21] Indian, a member of the Abenaki tribe.

THE COURT: How do you spell that?

MR. GILDIN: Abenaki?

THE COURT: Yes.

MR. GILDIN: A-b-e-n-a-k-i. He's descended from native Abenakis, both on his father's side and his mother's side; he married his wife, Karen Miller, as you will hear, in accordance with native customs; and Mr. Roy and Ms. Miller have been raising their two children, Renee and Little Bird of the Snow, in accordance with traditional native customs, beliefs and religion.

Now, you will hear that Mr. Roy was not raised strictly in the native tradition by his parents—they were practicing Catholics—although they did apprise him of certain of the beliefs and of the traditions. Beginning around 1972, Mr. Roy became aware or began to become aware, a term that he will explain to you talks about the gradual awakening to one's purpose, somewhat akin in the best way that we can understand it as not a native American to the religious transformation of being born again, but it's not that you wake up and suddenly are a religious individual. He began to realize that his native heritage, his native tradition and his native religion were, in fact, important and that it was time to seek his purpose in this world as a native Abenaki.

With respect to religious beliefs, this case is [22] somewhat unique in that you will hear that the native Americans, like Mr. Roy, do not distinguish between religion on the one

hand and culture and tradition. There's no distinction between the secular and the religious; all things are indeed religious. You'll hear this from Mr. Roy. You'll also hear today from Professor Driscoll from Bucknell University, who's an expert in native Americans.

Indeed, this very point was made by congress itself in the preamble to the American Indian Religious Freedom Act, where they state specifically that the religious practices of the American Indian are an integral part of their culture, tradition and heritage; such practices forming the basis of Indian identity and value systems.

It's also important to recognize that, in addition to the fact that native Americans do not distinguish between religion and the secular, that there's no single religious text such as the Bible or the Koran or the Torah which sets forth native American religious tenets. Religion comes from legend, religion comes from tradition, religion comes from the readings, the writings and word of mouth from other native Americans; and you'll be seeing some of these writings here today that Professor Driscoll has brought with him.

Now, as part of his growing awareness of his religion, Mr. Roy recognized the need to, what he will term, prepare his children for greater power. It's a concept that [23] Mr. Roy can far better explain than I can: That each living things has a potential for some sort of power, for some sort of spiritual capacity, and that it's the duty of the parent to help prepare his children for greater power and to allow the children to make their own choices in their lives, particularly with respect to things that could affect their ability to attain this greater power.

Now, we'll hear from Mr. Roy the steps he's taken to prepare Renee and Little Bird of the Snow for this greater power. One such step, Your Honor, has been his refusal to provide a Social Security number for her. Mr. Roy sincerely believes that because this Social Security number is a unique identifier, is used just to identify Little Bird of the Snow, is used extensively by the government, as they've confirmed in the various filings in this case; because Little Bird of the Snow cannot control that number, that it has the potential to rob that spirit, it has the potential to deprive her of that

greater power, and it's a decision that he cannot make for her. At some point in time, she's going to have to decide whether or not to adopt that number.

Now, Mr. Roy will expound upon those beliefs with far greater eloquence than I'm able to; but it's important to recognize, Your Honor, the legal standards which are to be applied in determining whether this belief is indeed religious. Courts are not to determine whether they believe those are true [24] or not. They're not to determine whether these beliefs seem logical or illogical. The law is quite clear that the beliefs don't have to be part of the beliefs shared by all members of a sect or part of a tenet of any particular religion. The question is: In Mr. Roy and Ms. Miller's lives, are these beliefs religious?

Nonetheless, we will have Professor Drinnon here today testifying that the beliefs of Mr. Roy and his practices are consistent with the fundamental principles of native American traditions and that these beliefs and practices are indeed religious in nature. From the pre-trial submissions and the list of witnesses, it's our understanding that the defendants will not bring to court any witnesses to testify concerning the religious nature of these beliefs. Indeed, the Department of Public Welfare has already determined at the hearing level in a decision affirmed by the department that these beliefs are obviously religious.

The second thing we must prove is that the beliefs are sincerely held; and we're confident that when you observe Mr. Roy here today describe his beliefs that you'll be satisfied that indeed these are beliefs which are religious. Professor Drinnon will testify that, beyond Mr. Roy's concern with the Social Security number, the other ways in which the Roy family has observed native American traditions is consistent with the larger history and traditions of native Americans.

[25] Mr. Roy has consistently told the defendants that the reason he refuses to provide this Social Security number for Little Bird of the Snow is because it's a religious objection. Now, Your Honor, you will hear that Mr. Roy has a Social Security number, as does his eldest daughter, Renee; but as Mr. Roy will explain, the number was obtained before he became aware of what he perceives as a potential for evil

of these numbers; and he will tell you that once that number is provided the evil is done and continuing to do so has no further effect; but with respect to Little Bird of the Snow, he simply cannot do so for reasons I've already stated.

Your Honor, perhaps the most compelling evidence of the sincerity with which he holds these beliefs is that the Roy family has elected to forego benefits totalling nearly $1,400.00 to date notwithstanding the fact that there were months when there was not enough money to even feed the family available; and as Mr. Roy will tell you, regardless of Your Honor's decision here today, that he will not provide that number; that if the choice is between foregoing those benefits and providing that number, it is no choice for him: He cannot provide that number.

Now, once we've established that this belief is religious and sincere, Your Honor, the burden shifts to the defendants to prove, first of all, that their interest in requiring Little Bird of the Snow to have a number is compelling. [26] It's a burden which the Supreme Court has found to be a heavy one, one which is not easily satisfied.

Now, we expect that the evidence here today will show that indeed the Social Security number is useful as a means of preventing fraud, checking whether someone is receiving wages even though they said they haven't, whether they're receiving benefits from other welfare programs when they believe they haven't; but the inquiry is not what its general utility is but what will happen if Little Bird of the Snow and she alone is exempted from that particular requirement.

The concern is: Is there a compelling state interest or a compelling governmental interest in not exempting this one individual? Why do they insist that Little Bird of the Snow must have the Social Security number: So that she will have a unique number in their computer system, a number which is basically used as a method of control and identification; which, ironically, Your Honor, comes very close to the heart of the plaintiffs' religious objection.

Now, we're going to hear a variety of purposes which this number serves, all of which fit into the basic heading, again, of preventing fraud, of preventing overpayment, of making sure that someone does not receive benefits when they're

not supposed to; a purpose which has consistently been held by the United States Supreme Court not to be compelling, particularly where there's no evidence that widespread fraud [27] will result if this number is not provided. It's undisputed that there's no fraud implicated by these plaintiffs, as they are clearly and undisputably eligible for these benefits; and again, while there's a purpose to be served generally by this requirement, there will be no evidence that a large number of people will come rushing in with religious objections to Social Security numbers as a means of defrauding the government.

Indeed, out of the millions and millions of recipients, the defendants have agreed that there are only four other reported cases where someone has raised any religious objection to a Social Security number. The Eastern District of New York, in Stevens versus Berger held that it could not be required because the effect of exempting an individual was, in the court's own words, miniscule.

Furthermore, Your Honor, none of the purposes served by the Social Security number will be jeopardized if Little Bird of the Snow is exempted. The number is used to identify other sources of income, other benefits that are received from the welfare program; and as Little Bird of the Snow is three years old, Your Honor, it's far down the line before she's earning any other wages. With respect to welfare benefits, the evidence will be undisputed that Mr. Roy and Ms. Miller will be required to provide their numbers, in any event, and that the only way that you would not detect welfare benefits sought by Little Bird of the Snow would be if somehow [28] a three-year-old girl could go into the welfare office without her parents, apply for benefits and that the welfare system would afford her those benefits; and we think the evidence is quite clear that her parents are required to provide those numbers and will. So, all of those wage matching and benefit matching purposes will be served.

Other purposes, such as finding absent children or finding absent parents are obviously not implicated here. We may hear evidence about the need for the number to make sure people are enrolled in Workfare programs and Work Incentive programs, but those don't apply until someone is 16 or

18 years old, and so we're talking 13 or 15 years down the line for those programs. Your Honor, when you look at the interest in providing a Social Security number for this little girl, we find that they're clearly not compelling.

Even were those interests somehow deemed compelling, the burden also lies with the government of proving that there is no less restrictive alternative; and Your Honor, notwithstanding what the evidence will show here today, no one ever considered an alternative when Mr. Roy applied. They simply told him: It's the law. No one ever explained to him why certain alternatives were or weren't available.

In an earlier discussion, Your Honor, we've submitted two: First, supplying the number of Mr. Roy and of his wife, Ms. Miller, for Little Bird of the Snow; and secondly, [29] using her name, a name which we believe the evidence will show is a unique identifier. But even if it wasn't, all it requires in the unlikely event that there's more than one Little Bird of the Snow, is a second computer search saying: Show me which one of the Little Bird of the Snow Boys was born on this date. As Mr. Wood will testify, that it takes about seven seconds, perhaps, to do this search.

Admittedly, the government finds this inconvenient. It certainly would be easier if, for every person, they simply had to throw in a number and out would come the individual file; but inconvenience has never been held to be the sort of interest that allows the government to violate the free exercise of religious beliefs.

Your Honor, this action is going to determine whether the plaintiffs are going to continue to have to endure the hardship of living below even the meager level of subsistence provided by these welfare programs as a price for the continued exercise of their religious beliefs. Also at stake, however, Your Honor, is whether one of the foundations upon which this country exists, the rights of religious freedom, can survive in a society which has become increasingly technological and increasingly computerized; and as we see it, Your Honor, this case may well determine whether computers now take precedence over rights in our society. Thank you.

THE COURT: Do you wish to make a statement at this [30] time, Mr. Rossier, of what you intend to prove?

MR. RESSLER: Your Honor, I would prefer that Mr. Hirt make his opening statement first.

THE COURT: All right.

MR. HIRT: May it please the Court, my name is Theodore Hirt, appearing on behalf of the two federal defendants.

Your Honor, I think I would take a slightly different approach in terms of the issues in this case. I think that we do depart from the plaintiffs' counsel in the way that we characterize the balance between the governmental interests in requiring a uniform system of identification through the Social Security number and how that interest of the government, which we indeed contend is the public interest, should be weighed against the objections of particular individuals in the society.

The two issues before the Court are, in a separate sense, first to scrutinize under the case law the plaintiffs' beliefs. The plaintiff has raised an objection under the First Amendment and the various statutes cited. The issue before the Court, the threshold issue is: First, is this belief truly held? Second, can it be linked to a religious tradition as opposed to what has been termed in some cases philosophical objections to complying with a particular governmental request or complying with the regulations that may be conditions of participation in a federal benefit program?

[31] Now, of course, Your Honor, if you reached the first point and said: I do not believe that Mr. Roy, one, is sincere; or second, I do not believe that his objection, as he's termed it, can be linked to a religious tradition, Your Honor is free and indeed should dismiss this case without having to go to the second step, which is the balancing, which is decided in the precedents, to consider whether the religious objection, assuming indeed it is based upon what we could call a religious tradition or--

THE COURT: I've heard you say "religious tradition" three times. Why does it have to be a tradition?

MR. HIRT: Well, I'm actually using a term that the plaintiffs have used, and I'm not necessarily saying it has to be a tradition. I suppose one could have a theory that one can form one's own religion.

I think that as the facts will be presented, I expect that the plaintiffs' theory of the case is to link Mr. Roy to a religious tradition. So, I'm taking them at the threshold of proof that they seem to want to go to.

I think, at least from the precedent—and I think that some of the Supreme Court cases will talk about this—that at least you have a better way of gauging the sincerity issue, for instance, if the person is affiliated with a particular sect or at least has some sort of value system that you can correlate to some body of knowledge—oral, written, [32] traditional, whatever—rather than have someone sua sponte start from scratch and say: This is my religious belief.

We have to get back, I think, to some gauge, some measuring stick. I think the measuring stick that the plaintiffs choose in this case is what they've called a tradition, and they're going to link it back, according to their proof of native American history, to Mr. Roy's own beliefs. I don't think it's indispensable, but I think that one would have to find some sort of gauge; and I think it would be a very troublesome case if one could say: I have my own religion, and this is it.

I think there would be greater scrutiny, but I think that the Supreme Court cases would say that you do have at least a gauge. For instance, I think in the Seeger case, in the fact situation there, there was some proof regarding Quaker views, presumably pacifism; so the Supreme Court had a measuring stick. You don't, I concede, have to say that every Quaker thinks alike any more than every Catholic thinks alike; but at least you have a gauge to reconcile someone's view of reality to other people's views and try to see: Is this religious or not? Because I do think that helps you to separate it out from the philosophical.

So, that may be, if that's a digression, but I think it may be of some importance here. So, the first issue before the Court is the sincerity and linking it to some sort [33] of religious belief, however we want to define that term; but the second issue—and this is where counsel depart and where the case law, I think, is to be scrutinized—is: What is the governmental interest in maintaining a uniform system, in this case linked to a unique numerical identifier, the Social Security number?

Where counsel and I depart is how we evaluate that test because, as the briefs that we've submitted to the Court indicate, there is a disagreement about the level of interest which the government must show. There are cases, we acknowledge, that use the term "compelling state interest." There are cases, however, which talk about interests of high order; there are cases which talk about an overriding interest.

What we submit is the correct application of the case law is to balance and that we are not saying that a de minimis governmental interest should outweigh a First Amendment challenge. However, we do not believe that the term "compelling"—if one is going to attribute "compelling" in the way that plaintiffs seem to say—is always going to be necessary. The reason we say that is: What is put in the balance? That is where we fundamentally disagree as to how this case should proceed.

Under the plaintiffs' theory of the case, as I understand it, Your Honor, the plaintiffs are saying: We concede, we recognize that the Social Security number is [34] important. We recognize that congress has made certain findings of its importance. We recognize that there is fraud and overpayment in these two benefit programs. However, we believe that the state—in this case, the state and federal government—must exempt any particular individual from that system; that the compelling interest in the plaintiffs' theory, has to be met on a case-by-case basis.

We submit, Your Honor, that the case law would suggest that the compelling state interest—if that's the high standard that the Court might use—is looking at the overall governmental interest in maintaining this type of program and not necessarily: Is the program going to come to a screeching halt because of one individual who will be exempted from it?

The best precedent, Your Honor, for that is United States versus Lee, a tax case where at issue, as I recall the facts, was whether certain orders—I think it was Amish—should contribute to the Social Security system. Now, the Supreme Court did not have in front of it evidence that, if the Amish were exempted from the tax system, the entire tax system

would be jeopardized or that the deficit would rise by one billion dollars. Obviously, the Amish are a well-recognized sect. They are a very small sect. They are not, as I understand it, not millions and millions of people; and certainly the Supreme Court did not go up on the situation that the Amish would show that the government would prove, would have their [35] burden of proof to show that, if the Amish are not included in our tax system, the tax system would fall apart.

The government should not be held, Your Honor, to that sort of burden of proof because, under that theory, every single case will turn upon the one individual coming to this Court, as the plaintiffs are doing today, and saying: Let us out of this requirement. We can not adjudicate and have these cases come out, Your Honor, if it's always "What is the cost of letting me out of the system?" because every individual can raise that claim.

The proper test, Your Honor, under the First Amendment is: Does the government have an interest, however we define it, in having this system run as a uniform system; and are there alternatives to running that system? Because the second point where the plaintiffs and the defendants part company is the alternative issue.

Under the plaintiffs' theory, as I understand it, the government has to accommodate each individual. Now, putting aside, Your Honor, whether such accommodation is technically possible, which is another issue, I submit that the government does not have to accommodate in the manner that the plaintiffs are talking about because, under the cases such as United States versus Lee, we're talking about: Can the government run the system in some other way that is less intrusive upon people's religious beliefs?

[36] What we have here, Your Honor, is a system, as the plaintiffs concede, that is rational, that is organized, that is run for bona fide purposes and is very effective in reducing fraud and overpayment and serving as a means of identification. I submit, Your Honor, that the alternative that would have to be shown is whether one can design an alternative system, not whether the system should accommodate itself on a case-by-case basis to this type of individual.

The other point I would make on that, Your Honor, and the irony of it is, of course, the plaintiffs are coming before

the Court today saying: We qualify for benefits, and we aren't going to perpetrate any fraud upon the system. Obviously, Your Honor, if these plaintiffs were not qualified for benefits, they would have no standing to even be in this court room. In other words, this case would not even come before this Court, presumably; and the problem that we have, Your Honor, on this case-by-case basis is, obviously, every individual, every applicant will come into the system; and assuming that he or she or their family is qualified, they will obviously say: We do not intend to perpetrate fraud on this system; we will report our income honestly, correctly and completely. But obviously, there are several problems with that; and I'm not imputing those particular plaintiffs, Your Honor.

I'm saying that human nature is such that things change, people's income can go up or down, families can break [37] apart, be put back together in various ways, each individual is unique, this is a mobile society; and we cannot have a situation where we look at this case today, May 17, 1984, and say: Today, the Roys have no income; today, Little Bird of the Snow has no income; therefore, we will let these people out of this system. Because we do not know, two years from now, whether Mr. Roy might move. We don't know whether, in fact, he has moved since we were last before the Court.

THE COURT: I don't understand what that has got to do with the Social Security system.

MR. HIRT: Okay. The Social Security system is meant to be a means of identifying individuals who are qualified to receive benefits; and one of the important features—as I will get into when we describe our testimony—is the ability to match people's eligibility across jurisdictions. For instance, in the State of Pennsylvania, one can check whether someone is collecting welfare in Philadelphia and, let's say, Lancaster. Similarly, through a cross-check, one can discover whether someone is collecting Social Security—excuse me, A.F.D.C. benefits in Camden, New Jersey, and across the border, let's say, in Philadelphia in a metropolitan area such as that metropolitan area.

The D.C. metropolitan area, which is Virginia, Maryland and the District, you have people who move, you have peo-

ple who may work in one district and reside in another [38] district; and it's very important to have individual identification.

Under plaintiffs' theory of the case, Your Honor, Little Bird of the Snow falls out of the system, and if the family moves, if the family splits apart, if someone tries to collect benefits for Little Bird of the Snow who's a relative or a friend, Little Bird of the Snow is not in that identification system. So, a cross-match, if it's not linked to a Social Security number, will not uncover that individual's identity, and you have the possibility of fraud, you have the possibility of duplicate payments, you have the possibility of erroneous payments; and I submit that those are all interests that are served by the uniformity of that system. So, that is the essence of the type of interest that's at stake here.

It's not, I think, in a pejorative sense, a means of trying to control people. It's a means of the government trying to have fiscal and management accountability in these programs. These are billion-dollar programs, and I think the government has an interest in setting eligibility criteria, which includes this as a requirement; and obviously, it's a voluntary program.

Now, there is this conflict between the two interests, but I submit that the interests cannot be so balanced that, if you only have one particular objector to the system, if it's a unique objection, that you let that person out of the [39] system. Because under that theory, Your Honor, if one accepts that logic, the more people you have who object—what does that mean?—you have more people now objecting to the system. Does that mean that the governmental interest becomes less because now there are more people objecting to it?

Under the plaintiffs' theory, the government really doesn't win either way. If there are very few people, they will say: Well, let those people out. If there are a lot of people who come down the road with a religious objection, which has to be scrutinized by someone to determine whether it's a religious objection, assuming it doesn't go to federal district court, then the state has to decide. Well, now we have a lot of people raising these objections. Now, we have to do something else.

I submit, Your Honor, that this is one of these situations where the line has to be drawn somewhere; and I submit that the precedent would call for us drawing the line right here and now and ruling in favor of the government and not allowing exceptions to build up into the system.

So, we do disagree fundamentally with the plaintiffs in terms of the theory of the case, and it does not matter in this individual situation that the plaintiffs are eligible, that they are not committing fraud, that they are honest, that they want to be fair, and that they want to proffer sincerely, if that's the weight of the testimony, some alternative. The issue is: Should the government accommodate that? What is its [40] general interest? What is the public interest?

Your Honor, in terms of the testimony that we will present, we will present three witnesses. The first witness, Your Honor, is going to be Bruce Hanger from the Social Security Administration; and he will be testifying in lieu of his supervisor, Mr. Harant, whose name has come up. Mr. Hanger serves in what's called the enumerations branch of the Social Security Administration. His branch deals with the assignment of Social Security numbers and the maintenance of central computer files, Your Honor, that have been noted in the Harant affidavit and which Mr. Giblin has cited to the Court.

I think it will be interesting, Your Honor, and helpful to describe how the system receives numbers and how the numbers are assigned, and I expect that Mr. Hanger's testimony will show that the system is well designed on a numerical system; that the plaintiffs' offer through, I expect, Professor Wood that you do an alternative system just is not feasible. In other words, we will say that the Social Security number, as a unique identifier, is built into the system; and not only is it built into the Social Security system, which sits in Baltimore, but that is the system which is used by other jurisdictions.

So, one of the problems with the plaintiffs' theory, Your Honor, is not that you tamper with one computer but that you have to tamper with every computer system. I think that, without getting into a point-by-point refutation of Mr. Giblin--[41] since I'm not testifying and he's not testifying,

the theory that the only governmental interest is saving time is a misreading of Mr. Harant's affidavit.

THE COURT: I never pay any attention to any affidavit in a case.

MR. HIRT: All right, fine, Your Honor. I'll go on, then, Your Honor.

THE COURT: All I'm saying is: I want to hear it from the stand. You can't cross-examine an affidavit.

MR. HIRT: Okay, fine, Your Honor. The second witness, Your Honor, will be Bob Stauffer, who's from the Office of Family Assistance of the Social Security Administration; and he is going to describe in a more programatic way how states, such as Pennsylvania, which is in Region Three of H.H.S., among I think six states all together, how cross-matching is done.

I think it's important to give that emphasis to show that the Social Security number is not simply something used in Lycoming County, Pennsylvania, where the Roys physically reside, but it has intrastate and interstate and national significance; that it is a unique numerical identifier that's used across lines, and it is the means of communicating; and Mr. Stauffer will give some examples of why the number is being used and why that, in fact, is the trend of states to use the number more and more as a part of fiscal accountability, quality control, reducing errors and making correct benefit [42] determinations.

Our final witness, Your Honor, will be Virgil Conrad, Deputy Administrator of Family Nutrition Programs for the Department of Agriculture, who will testify concerning the food stamp program. Once again, his testimony will emphasize the role of the number in that billion-dollar program and its use to reduce these overpayments. Again, although the Department of Agriculture has not, through the state, reduced food stamp benefits, the legal theory is that they—

THE COURT: I couldn't understand this last sentence. Give it to me again.

MR. HIRT: In other words, Your Honor, I wanted to make—

THE COURT: Go ahead. I'm listening.

MR. HIRT: Okay. I want to make sure that Your Honor was aware that there have been no cutoff of food stamps to

these plaintiffs, but there were administrative hearings, which I think have been interrupted by the court proceeding.

* * * * *

[43] MR. HIRT: All right, fine, Your Honor. The point I just wanted to clarify, Your Honor, if that was Your Honor's question, was that although there have been no termination of food stamp benefits to this family because of their refusal to give a Social Security number for their daughter, this is part of the policy of the Department of Agriculture, the same as the federal defendants, and Mr. Conrad will also explain the federal interest in that program; and I just wanted to emphasize that that is the distinction in terms of the facts before the Court.

But the legal policy is the same, and although one could argue ripeness, sooner or later the issue would come to the court in terms of the food stamp issue, which is precisely the same in terms of the legal matter. So, he would be the third witness that we would present. So, that would be my conclusion of the evidence, then, Your Honor.

THE COURT: Thank you. Mr. Ressler, do you want to make an opening statement now, sir?

MR. RESSLER: May it please the Court, Joel Ressler [44] on behalf of Defendant Cohen. Defendant Cohen is the Secretary of the Pennsylvania Department of Public Welfare; and in essence, our position is precisely the same as the federal position, and I will not reiterate what Mr. Hirt just said.

I would just like to emphasize a couple of points. First, it's undisputed that Pennsylvania's role in this system is, pursuant to federal law, that Pennsylvania and the federal government are in a joint, cooperative relationship with respect to the A.F.D.C. and Food Stamp programs.

THE COURT: Wait a minute. You've used an acronym there that I'm not familiar with.

MR. RESSLER: A.F.D.C. is the—

THE COURT: I know what it is now. Aid to—

MR. RESSLER: Aid to Families with Dependent Children.

THE COURT: Try to stay away from jargon which is common to a particular branch of the government. I run into

this with the IRS and we have it in computer cases, and it's very difficult for me. I'll tell you what happens: If I get a long strong of letters like that and I don't recognize it immediately, I'm trying to decipher those and I run a chance of missing the rest of the sentence or the significance of it. So, it would be better if you could give me the full treatment on the names.

MR. RESSLER: Very well. We have three programs [45] that are involved in this suit. One program is the general cash program, what I just called the A.F.D.C. program. Another program, which is very closely tied to this, is the medical assistance program.

Now, the way that medical assistance normally works, and I believe that it works in this case, is that if someone is eligible for the cash program, they automatically are also eligible for the medical component.

THE COURT: Is that Medicade?

MR. RESSLER: Medical assistance is the state term; Medicade is the federal term.

The third program is the food stamp program. Eligibility is slightly different for food stamps; but in this particular case, it is undisputed that, but for the Social Security number requirement, Little Bird of the Snow would receive food stamp benefits.

Now, Pennsylvania is mandated under federal law to ask recipients for Social Security numbers, and that is what Pennsylvania has done in this case. So, when the issue comes up, when the question is: Was there an alternative available? Pennsylvania does not have an alternative. The benefits that Pennsylvania would give to Little Bird of the Snow are part federal and part state dollars. If Pennsylvania were to give benefits to Little Bird of the Snow under this joint program without the approval of the federal government, the federal [46] government would not reimburse Pennsylvania for that money.

So, as a result, Pennsylvania really here has no choice. We have a congressional law, which says that you must have the Social Security number; and Pennsylvania administers that law in this state jointly with the federal defendants; and when we were faced with this particular request on behalf of Little Bird of the Snow, we turned to the statute, and the

statute itself admits of no exception, and we denied the request. That's the way the system works because otherwise Pennsylvania would wind up taking the burden itself of paying extra benefits for which the federal government would not reimburse the state.

That doesn't mean, though that if we had the choice we would have granted the exemption. We also feel that the requirement of a Social Security number is a valid requirement; and our witness, Charles Chamberlin, the Executive Director of the Lycoming County Assistance Office will testify as to the uses that his office on the local level uses of Social Security numbers. He will be the only witness we will present, Your Honor; and that is the conclusion of my statement.

THE COURT: Fine, thank you. Ms. Allaben, do you wish to make an opening statement?

MS. ALLABEN: No, I won't be making a statement.

THE COURT: You've got the right to withhold that until the end of the plaintiffs' case in chief. So, if you want to make one at that time, I'll be glad to hear it.

* * * * *

[47] MR. GILDIN: Your Honor, at this point, the plaintiffs will call Stephen Roy as the first witness.

THE COURT: Do you take an oath?

THE WITNESS: Yes.

(Witness sworn.)

THE WITNESS: I can affirm that, Your Honor.

THE COURT: Very well.

[48] STEPHEN J. ROY,

having been called as a witness on behalf of the plaintiffs, being first duly sworn according to law, testified as follows:

EXAMINATION

BY THE COURT:

Q. Your name is Stephen J. Roy; is that correct?

A. Yes, sir.

Q. You spell it with a "p-h."

A. Yes, I do.

Q. Where do you live, Mr. Roy?

A. At 565 Erie Avenue in Williamsport, Pennsylvania.

Q. How long have you lived there, please?
A. Two years now.
Q. What is your wife's name?
A. Karen Miller.
Q. How many children do you have?
A. Two. It's Renee Ann Roy, she's six years of age; and Little Bird of the Snow, and she's three years of age.
Q. You're one of the two plaintiffs in this case and your wife is the other; is that correct?
A. Yes, sir.
THE COURT: Okay.

[49]

DIRECT EXAMINATION

BY MR. GILDIN:
Q. Mr. Roy, I want to start out by asking you some questions about your lineage.
MR. GILDIN: Your Honor, would I be permitted, at least at the relevant times, to read for the benefit of Mr. Roy and the Court certain of the undisputed facts?
THE COURT: I have no problem with that. I think it would be helpful if you did that.
MR. GILDIN: Instead of just asking him those questions.
THE COURT: Sure.

BY MR. GILDIN:
Q. Mr. Roy, it's already been agreed to by the parties in their comprehensive statement, first at Paragraph One: "Plaintiff Stephen J. Roy is a Native Abenaki."
Is this an American Indian?
A. Yes, sir.
Q. It's also been stipulated at two that your great-grandfather on your father's side was a tribal chief in an Abenaki tribe, and at Paragraph Three, that the grandfather on your father's side was a full-blood Abenaki.
Are those facts correct?
A. Yes.
Q. Well, let's ask you then about your mother's side. [50] What's your mother's name?
A. Marilyn Roy.
Q. Was she all or part native American Indian?
A. She's part, but I'm not exactly sure at this time of how much.

Q. From what tribe would that be?

A. One of the older tribes of the Abenaki.

THE COURT: Where is the area which was inhabited by the Abenaki.

THE WITNESS: New Hampshire, Vermont, parts of Maine and Southeastern Canada.

BY MR. GILDIN:

Q. Mr. Roy, are you registered with any organization as a native American Indian?

A. Yes.

Q. What organization might that be?

A. The Three Rivers Council.

Q. Could you explain—

MR. HIRT: Your Honor—

THE COURT: Yes, sir.

MR. HIRT: I don't want to object at the wrong point, but I have an objection to someone testifying that he is technically enrolled somewhere without presentation of evidence, in fact, of that enrollment.

THE COURT: I think the best thing to do is just [51] object and give me your reasons, and I'll rule on it. I have a feeling that that objection came late, but that Mr. Hirt may be having trouble hearing the witness. We'll ask you to ask the question again.

MR. GILDIN: Certainly, Your Honor.

THE COURT: Then, if you want to object, I'll hear about it. Point that microphone at your lips, will you, Mr. Roy? It's monodirectional and the acoustics in this splendidly designed court house are miserable at best.

MR. GILDIN: Okay. I'll reask that.

BY MR. GILDIN:

Q. Mr. Roy, are you registered with any organization as a native American Indian?

A. Yes.

Q. What is that organization?

MR. HIRT: Your Honor, I have the same objection In terms of registration, I think—if that's the term—that plaintiffs should proffer some sort of written documentation of registration.

MR. GILDIN: Your Honor, I don't think the best evidence rule requires that plaintiff to provide documentation when he knows it, other than the fact that it happens to be memorialized in the document. My understanding of the best evidence rule is that when the only reason the person knows it is because he read it in the document, then the document is [52] appropriate; but certainly, Mr. Roy can testify that he took the steps of enrolling in the Three Rivers Council.

THE COURT: We'll overrule the objection.

BY MR. GILDIN:

Q. I believe you stated that you are registered in—

THE COURT: I'm not sure. You may answer the question.

THE WITNESS: Yes.

BY MR. GILDIN:

Q. What does the Three Rivers Council do?

A. They provide services to American Indians in the State of Pennsylvania, particularly in the western part and central part of the state.

Q. Could you just explain what some of those services they provide may be?

A. They give you cultural—they're a cultural center as far as, you know, keeping Indians—keeping track of them and following them around the state; and say like if they get into trouble of any kind, they try to see what they can do to, you know, help them.

Q. These services are limited to native American Indians?

A. Yes.

Q. Now, Judge Muir has already brought out the fact that you're married to Karen Miller. Could you explain how you [53] accomplished this marriage in accordance with the native custom?

MR. HIRT: Your Honor, I object. That's clearly leading the witness.

THE COURT: What's your response to that? Also, how is it relevant?

MR. GILDIN: Well, Your Honor, it's relevant to show that this Social Security number is not the only part of his life that he decides has anything to do with his native

Abenaki tradition, culture and religion. You'll see that this gentleman is living his life, to the extent possible in the 20th century, as a native Abenaki, starting with respect to his marriage to his wife.

THE COURT: All right. We'll overrule the objection and permit a limited inquiry along this line. I don't think we need to go through any great mass of details about the marriage itself.

MR. GILDIN: No. This will be very brief, I think you'll see, Your Honor.

BY MR. GILDIN:

Q. Could you explain, again, Mr. Roy, how your marriage was accomplished in accordance with the native custom?

A. We negotiated our relationship, as is customary, and then I moved in for a period of time with my wife's mother; and at one point, I had written the chief and informed him that we had considered ourselves married.

[54] Q. What chief is this that you wrote?

A. A man by the name of Al O'Bomsawin.

Q. Perhaps you can explain that or spell that for the reporter.

THE COURT: I couldn't hear you and the court reporter couldn't hear you either, Mr. Roy.

THE WITNESS: This is a man by the name of Al O'Bomsawin.

BY MR. GILDIN:

Q. Do you think you could spell that for the benefit of the Court?

A. It's an "O" with that punctuation mark, and then its B-o-m-s-a-w-i-n.

Q. You say he's a tribal chief?

A. He was, yeah.

Q. What tribe is that?

A. The Abenaki.

Q. Now, I believe it's already been established that you have two children, Renee and Little Bird of the Snow. How old are each of them?

A. Well, Renee is six years of age, and Little Bird of the Snow is three years of age.

Q. Are they enrolled on any native reservation?

A. Yes, they are.

MR. HIRT: Your Honor, I have the same objection.

[55] THE COURT: Yes, sir. Go ahead.

MR. HIRT: I have the same objection. The best evidence is actually an evidence of enrollment in that organization, not that he says he's enrolled in an organization.

THE COURT: What's your view?

MR. GILDIN: Your Honor, I think this is the same thing we've been through before. This man is capable of testifying that he took the steps to enroll his children on a native reservation. The reason that he knows it is not that he read it in a document; it's that he took these steps. The best evidence rule simply does not apply.

MR. HIRT: Your Honor, the term "enrollment" suggests that the enrollment application was accepted, and the best evidence of the acceptance of an enrollment application, by which I assume the plaintiffs are trying to establish a bona fide affiliation with a particular tribe, is whether that tribe has accepted that application. One can file any number of applications.

THE COURT: I'm going to overrule the objection. I want to tell you this: We've listened to you this time Mr. Hirt for the second time around.

MR. HIRT: That's the only time I'll object.

THE COURT: But it's better, and it is our practice to hear everything in support of an objection, and then we listen to the other side, and then we rule on it. We'll overrule [56] the objection.

MR. GILDIN: Thank you, Your Honor.

BY MR. GILDIN:

Q. The question, again, Mr. Roy: Are your children, Renee and Little Bird of the Snow, enrolled on any native reservation?

A. Yes.

Q. What in your view is the effect of this enrollment?

A. To keep them identified with the tribe.

Q. And what tribe is that?

A. The Abenaki.

Q. Just as a point of clarification, are your wife, your two children and yourself all living together?

A. Yes.

Q. Now, I want to get into the questions of your religious beliefs, but before we get into any of the specifics, is there any difference between what you view as a belief which is religious and on the other hand native American culture or native American tradition?

A. Well, it's my beliefs that tell me how to live, and that's how I live my life.

THE COURT: I'm sorry, Mr. Roy, I'm having a great deal of trouble hearing you. Now, the doctors at Geisinger certify that I've got normal hearing, but in this room, it's difficult at best, and I'm only six feet away from you and I [57] just simply can't hear anything you're saying, so I'll have to ask you to speak more loudly.

BY MR. GILDIN:

Q. Let me reask the question and you can answer it again.

Is there any difference between what you view as a religious belief on the one hand and native American culture and tradition on the other?

A. No, because what I believe, that tells me how to live.

Q. Now, some religions have a Bible or a Koran or other single source, written source of their religious beliefs.

Is there any sort of single written source for your native Abenaki beliefs?

A. Not that I'm aware of, no.

Q. From where do you derive your religious beliefs as a native Abenaki?

A. Partly from intuition, partly from hearing other Abenakis speak, partly from what I read about religious teachings.

Q. What persons would have written these articles, not specifically; what types of persons?

A. Holy people.

Q. Holy people in the sense of native Americans?

A. That's how I would term them. Some term them [58] traditionalists and some term them medicine men. I would term them holy people.

Q. But as a point of clarification, these are native Americans who have done these writings.

A. Yes.

Q. Are any of your beliefs derived from native legend and tradition?

A. Some of them, yes.

Q. Now, Mr. Roy, are you part of any sort of larger, organized religion which would congregate on a weekly basis or a monthly basis?

A. I don't know of any among the native Americans, no.

Q. You don't know that there are any such organized religions generally among native Americans.

A. No.

Q. I'd like to just get a couple of terms defined before we get into explaining where they fit into your particular beliefs. What do you mean—what do you mean, I suppose—by the term "to become aware"?

A. That's where you're gradually given the knowledge of how—of what your place in this world is to be or what your great mystery is to be as you understand it and what your purpose is in that great mystery.

Q. Is this an experience that is religious in nature, as you would view it?

[59] A. Yes. It has to do with, you know, finding your place here, you know, why you're here and what you're doing here and what your purpose is to be while you're here.

Q. When you said "your place in the great mystery," what did you mean by "the great mystery"?

A. Well, how all of us came about, how everything came about.

Q. We're also going to get into the notion of preparing for greater power. Now, could you please explain what you mean by that term, "to prepare one for greater power"?

A. It's when you take certain steps and certain rituals to purify your spirit, to purify your body, so you can have greater spiritual power.

Q. Do you conceive of this as a religious type of event in your life?

A. Yes.

Q. I know that you've said that you don't draw those distinctions. Yes?

A. Yes.

Q. Why would one care to be prepared? Why would it be important to prepare one for greater power?

A. Well, for one, to protect themselves from whatever evil they might encounter; so they might be able to heal or to foresee into the future, or to take actions to prevent evil from being done to themselves.

[60] Q. Does one prepare oneself for greater power, or how is it accomplished?

A. It's usually accomplished through the grandparents; but in our case, the grandparents aren't available for our children, they live quite a distance away, so we've had to take this role over.

Q. Are the steps you've taken to prepare your children for greater power religious in nature, as you would view that term?

MR. HIRT: Your Honor, I don't want to make a point of objecting to leading questions, but we're getting into the merits of this very issue, and I think that the witness should characterize his testimony and not his counsel.

THE COURT: What's your view as to whether that's a leading question?

MR. GILDIN: Your Honor, that didn't suggest—the leading question would be: Isn't it true that these are religious in nature? I asked the question: Are they religious in nature? He can answer yes or no, which is the whole spectrum of possibilities.

THE COURT: I'm going to sustain the objection. It's a leading question. It suggests the answer.

MR. GILDIN: Pardon?

THE COURT: It suggests the answer.

MR. GILDIN: Thank you. Your Honor, without [61] offending the Court, would it be appropriate to ask whether they—

THE COURT: You may certainly pursue the question or the inquiry about that. Just because you led him once doesn't mean you can't—

MR. GILDIN: I'm just wondering if the Court would consider a question as to whether they were religious or not religious in nature to be leading.

THE COURT: The best way to do it is to ask him another question which you think is appropriate, and if there's an objection to it, then we'll rule on it.

BY MR. GILDIN:

Q. Mr. Roy, as you view the concept of preparing your children for greater power, would you view it as a religious type of process or as a non-religious type of process?

MR. HIRT: Your Honor, I think that's the same question based upon this inquiry. I think the correct question would be, "How do you describe it?" and let the witness say it in his own words rather than make what I think would be the obvious choice from the thrust of his prior question.

THE WITNESS: I have trouble with that question.

THE COURT: All right. I'm going to sustain the objection.

BY MR. GILDIN:

Q. Maybe I'll just ask you: What is the purpose again [62] of preparing your children for greater power?

A. It's so they may be more able to protect themselves in this life and be more successful in this life. This is done in accordance with tradition, and that's why I have the trouble with describing that as religious or not. It is cultural, and I don't separate religion from my culture.

Q. Thank you. Let me ask you a little bit about your upbringing.

Did your parents strictly follow the Abenaki religious or, as you more properly term them, cultural and traditional beliefs in raising you?

A. No. They were Catholics, and they pretty much adhered to Catholicism. There were little things. We were always taught to have our own mind, to do our own thing, and we were always taught to have respect for other people and to have respect for their feelings.

Q. Did your parents prepare you for greater power in the senses that you've used this term?

A. No, no, they weren't aware of things like that.

Q. Did they teach you any other native traditions and rituals, other than the importance of developing your own personality?

A. Yes. My father, he used to teach us how to fish and, you know, the particular aspects of that.

Q. What about the way that you were taught about [63] fishing derived from native tradition?

A. Well, it's my own belief in this regard, but it's possible for one to communicate with these fish by using the method of prayer.

MR. RESSLER: Your Honor, I'll object. I don't believe that answer was responsive to the question.

THE COURT: What's your view?

MR. GILDIN: I think he responded precisely to the question of what is it about fishing that had its origin in native tradition and culture; and the witness gave precisely what it was: the ability to be able to communicate with these fish by prayer.

THE COURT: I'm going to overrule the objection.

BY MR. GILDIN:

Q. Now, Mr. Roy, was there a point in time where you began to become aware, as you've described that term?

A. Not a certain point in time, no.

Q. Is there a time that you began the process of becoming aware?

A. Yes. I'd say that when I first moved to Central Pennsylvania.

Q. Could you tell us—I'm sorry.

A. That was back in 1972.

Q. Could you tell the Court what sorts of things caused you to become aware or begin rather, I suppose is more [64] proper, to become aware?

A. The beauty of the mountains here and the wildness of some of the areas around here.

Q. Was there anything other than just the beauty of the area that caused you to become aware or begin to become aware? I'm sorry.

A. Well, I began—that's when I first, after a little while, I began to learn of certain teachings.

Q. How did you begin to learn of these teachings?

A. Through reading mostly at first; partly from intuition.

Q. After you had done these readings, as you've previously described them, and this intuition, was there anything else that contributed to this process of becoming aware?

A. Well, I did have a conversation with a friend of mine by the name of Timothy Saver, where he's a born-again Christian, and he preached to me on the evils of the Social Security numbers and how these things were to be used to

deny one access to heaven, but that's not my particular belief with him. I have my own belief.

In 1980, I did see one of the chief of the Abenakis speak in Harrisburg, where he had given a talk on how he felt that technology was robbing the spirit, that technology was robbing the spirit of man, and how there was a great robbery of the spirit in this system because of the way they apply their [65] technology, modern-day technology.

Q. You're saying this was an Abenaki chief who you heard?

A. Yes.

Q. What was his name? If you could state it and then spell it for the benefit of the reporter.

A. Okay. It's Gerald Rampart Tsonakwa, and the last name is T-s-o-n-a-k-w-a.

MR. GILDIN: Now, I note you have a photograph with you which is not on our exhibit list, Your Honor; and therefore, I don't think that—pardon?

THE WITNESS: I brought it.

MR. GILDIN: He brought it to court here today. We'd just ask for the Court's guidance on the matter. Would it be appropriate just to—would you like to see that photograph of Chief Tsonakwa?

THE COURT: Is this a photograph of the chief?

MR. GILDIN: Yes, it is.

THE COURT: Well, I think what ought to be done is that you ought to offer it and see whether there's an objection; and if there is, then we'll rule on that.

THE WITNESS: It does show the particular hairstyle of our tribe that they consider to be traditional.

MR. RESSLER: Your Honor, I don't want to interrupt the witness, but I don't think there's a question pending.

[66] THE COURT: There is not.

MR. GILDIN: May I approach the witness for a moment, Your Honor.

THE COURT: Yes. Let's give this a number, so whatever our ruling is, if the court of appeals feels it's erroneous, then it can be referred to.,

MR. GILDIN: This would be marked as Plaintiffs' Exhibit 19, Your Honor.

THE COURT: I didn't mark down the chief's last name.

THE WITNESS: It's Tsonakwa.

THE COURT: Spell it for me, please.

THE WITNESS: It's T-s-o-n-a-k-w-a.

MR. GILDIN: Do I have permission to approach Mr. Roy again?

THE COURT: Yes.

BY MR. GILDIN:

Q. I show you what's now been marked as Plaintiffs' Exhibit No. 19. Could you state what this is a photograph of?

A. That's a picture of the chief and his wife as we had seen them where he had spoke in Harrisburg.

Q. Is that a true and accurate depiction of Chief Tsonakwa and his wife as you saw him?

A. Yes.

MR. GILDIN: Your Honor, at this point, we would [67] offer—excuse me. I'll show it to opposing counsel—offer into evidence Plaintiffs' Exhibit 19. Mr. Roy has assured me that he will part with it for purposes of this proceeding.

THE COURT: Well, we can have a photocopy made of that, which is good enough, once I see the original, and the clerk will do that for you during the lunch break.

Do the defendants object to that?

MR. HIRT: We won't object. It seems to be an authentic document, but we don't know what the relevance of the proffer is.

THE COURT: So, you object to it on the ground of relevance?

MR. HIRT: I don't understand the relevance of the document unless it's only to establish that he met the man and that that is the man.

THE COURT: Well, I've got to have something I can rule on. I think if you wish to object on the ground of relevance, then—

MR. HIRT: Well, I object on the ground of relevance; no relevance beyond the identity of the individual that has been stated.

THE COURT: How is it relevant?

MR. GILDIN: Your Honor, first, it certainly corroborates Mr. Roy's testimony that he did, in fact, see this gentleman lecture. Also, as Mr. Roy began to talk about, he'll [68] demonstrate the hairstyle on this Abenaki chief is in the same

manner as he wears his hair and that there is a religious significance to that.

MR. RESSLER: Your Honor, we fail to see the relevance there. This isn't a case involving hair length.

THE COURT: Well, I think that objection should have come a little earlier, but apparently you didn't know that that was going to be the purpose of it. I'm going to sustain the objection, but not for the reason given. I'm going to sustain the objection because the document wasn't shown on the exhibit list, and I don't think that it's sufficiently important that we should depart from the practice of having these exhibits shown to the other side well in advance of trial. Then we can get all of these things ironed out.

MR. GILDIN: Thank you, Your Honor.

BY MR. GILDIN:

Q. You said that Tsonakwa discussed the notion of technology robbing the spirit of man. Did he say anything about preparing your children for greater power?

A. He had spoken on how he had prepared his own children by using—like, when they were born, he had saved the placenta and had gone out and picked an appropriate spot, and how he had done it, buried the placenta there to lay a root for his child, a spiritual root, and how he made prayer over this.

[69] Q. At some point in time, did you decide to prepare Little Bird of the Snow for greater power?

A. Yes, when she was born.

Q. Could you tell us what you did surrounding the birth of Little Bird of the Snow to prepare her for greater power?

A. Yes. I had the hospital save the placenta because they usually just throw it away, and we had asked that they save it, and we took it out—I went out with my daughter, Renee, and we buried it out here beside the Susquehanna River, and we made prayer over this; and at that point in time, as we were making our prayer, we had noticed a bird, a goshawk, more or less it came up out of the ground, and at that point, you know we made another prayer and made our offering and we had left; and this is how we got her name, Little Bird of the Snow.

Q. Was there some special significance of this naming ceremony or the fact that you observed this bird rise out of the snow and named your daughter Little Bird of the Snow?

A. This would give her a protection, an ally, a spiritual ally to be used in her life to protect her from evil.

Q. Can you tell this Court what prayer you made at that time?

A. No, I can't.

Q. Why is that?

A. To reveal the specifics of that prayer would be to [70] release that power.

Q. Now, are you attempting to raise your children to the extent possible in accordance with native beliefs?

MR. HINT: Your Honor, I have an objection. I think he should ask the question, "How are you raising your children?" and let him describe it; not "Are you raising them in accordance with native beliefs?" It's a leading question.

THE COURT: What's your view?

MR. GILDIN: Your Honor, I think this is simply preliminary to a whole set of specifics that the witness will go into concerning how he's raising his children.

THE COURT: Well, I'm going to overrule the objection because it's a generalized question which counsel has suggested that's going to get us into everything from toilet training on up, including eating habits and so forth. I think it's proper to particularize it. So, I'll overrule the objection.

BY MR. GILDIN:

Q. The question, again, Mr. Roy, is: Are you attempting to raise Renee and Little Bird of the Snow in accordance with native beliefs and traditions?

A. Yes. When we try to discipline our children, we don't try to involve physical violence, like I see so many people do nowadays.

Q. And why is that?

[71] A. Particularly, I'm trying to teach Renee the particulars of what we call medicine worship, and it's the use of wild plants and other substances to heal illness.

Q. Before we get even more particular, is there some general attitude or belief you hold with respect to the role the parent plays in the life of the child?

A. Well, as far as not making decisions for the child. Like, I was always taught to have my own mind, to make my own decisions and accept the consequences of those decisions; and we're trying to teach Renee and Little Bird that they're going to have to make their own decisions, and there are some decisions I cannot make for them; they must make them themselves if they're to have their own spirit and their own mind.

Q. Now, you described your manner of disciplining or not disciplining your children. Does that tie into the concept you've just described at all?

A. Yes.

Q. And how is that?

A. You don't try to beat your child down because you don't accept what it's telling you or you don't accept the way it's thinking. You're not trying to make the child think your way. Instead, you're trying to teach the child to respond to its own thinking.

Q. You talked already about the notion of using plants for medicinal purposes. Are there other activities or [72] traditions that you and your family have followed in keeping with your religious or cultural beliefs as native Americans?

A. We try to attend ceremonial dances as often as we can, and as far as—we try to go out to the various areas around here of what I call holy spots, such as the top of the mountains or waterfalls, and we try to hold observances and we make prayer, but I usually take these children out there and try to teach them there.

Q. What sort of things do you do when you go out to what you designate at these holy spots? What sort of prayer? I gather that you can't say the specifics, but what sorts of things?

A. Well, like I usually take my pipe out, and certain herbs that we've gathered before, and we make an offering.

Q. Now, I notice your hair length. Does that have anything to do with native traditions?

A. Yes, it does. Particularly, that's one of the Abenaki traditions that I hold.

Q. Could you explain that for the benefit of all of us?

A. It is a custom for our males to wear their hair long and loose, and this is one I've particularly kept to, perhaps well over half of my life.

Q. Why is the hair length important with respect to the traditions?

[73] A. It's the top of your head, and the top of your head is the part that is closest to the creator, and it's particular significance, specifically just the same line of reasoning like with us going to the mountain tops and make our observances there, and that's the part of the earth that's closest to the creator.

Q. What is the term you use for the creator with respect to the mountaintop?

A. I use the creator or father interchangeably. Our particular custom in wearing hair length is that one grows his hair long and loose to show respect for the father and to show the father that he's one of their children.

Q. Are there any other rituals you perform with respect to respect to the father?

A. Well, we have gone out on occasions, like I've said, to certain spots, on the tops of mountains near here where we live, you know, to try, as we put it, to sing the father to sleep.

Q. Could you explain what you mean by "singing the father to sleep," please?

A. We look at the sun as the source of all life, but not the sun itself. We call that the father, the source of all life, but the sun is rather the wigwam of the father. That's the home of the father, and when the sun sets, we say that the father is going to sleep, and it's one of our practices that we [74] sing to sooth his sleep.

THE COURT: It's one of your practices that what?

THE WITNESS: That we sing to sooth his sleep.

THE COURT: I still didn't get it. What did he say, Miss?

(The last remark by the witness was read back by the reporter.)

THE COURT: Thank you. You see, you were facing away from me, and I can't hear what you're saying.

BY MR. GILDIN:

Q. Are there any steps that you take with respect to the diet of your children consistent with the traditions of native Americans?

A. We try to make it as pure as possible; and on occasions where we have to feed them what we consider to be impure food, I try to use certain herbs to cleanse the poisons out of their blood. There are certain herbs that serve that purpose.

Q. How is that tied at all to the native traditions?

A. In purification, it's to purify your body, and in essence, you purify your spirit and you get greater power.

Q. Could you tell the Court any beliefs with respect to photographs?

A. Yes. We try to avoid having Little Bird of the Snow, having her picture taken because we believe that when you [75] take a picture of one's face, you freeze the eyes in it and that you also freeze a part of their spirit with that photograph; and particularly, I've had the photo exemption on my own driver's license to keep me from having to have that picture. We try to avoid that as much as possible.

Q. The Pennsylvania Department of Transportation granted you an exemption from the photograph requirement?

A. Yes.

Q. Is this because you lodged a religious objection to that?

A. Yes.

MR. HIRT: Your Honor, I don't want to stop every time he leads the witness, but I think the witness can answer what he believes the reason was and not have his counsel tell him what the reason was.

THE COURT: What's your view, counsel?

MR. GILDIN: Your Honor, I can easily reask the question, but I thought he explained that it was a religious basis.

THE COURT: Wait a minute. There's no question. Go ahead.

BY MR. GILDIN:

Q. Why was it that you asked the Department of Transportation for this exemption from the photograph requirement?

[76] A. Well, they have the block on the application where they ask you if you've got a religious exemption or a

religious objection to have them using the photo on your license, and in that particular regard, I do.

Q. Could you tell this Court about your trip to Minnesota, please?

A. Yes. I made a journey to Minnesota to try and go to the pipestone monument to gather pipestone to make my pipe.

Q. Why was that?

A. Because this is a certain place. There's a certain spot where you can only get this stone there.

THE COURT: Is it a reddish stone?

THE WITNESS: Yes.

THE COURT: Kind of a brick color?

THE WITNESS: Yes, and it's a stone that has special qualities. It's like soapstone in that it's easy to carve, it's easy to shape, and it also has spiritual qualities in that we believe that this comes from the backbone of the mother.

BY MR. GILDIN:

Q. Did you make that pipe?

A. Yes, I did?

A. What's the purpose of that pipe. Let me take a step back. How did you make that pipe?

A. I'd rather not go into that.

[77] Q. Why don't you want to explain how you made that pipe?

A. Because that would reveal certain things that I've done to set that pipe in order to give it power.

Q. Now, I notice you have up there with you two feathers. Can you tell me what those are?

A. Yes, sir. They're blessed eagle feathers.

Q. Why is it that you brought those to court and to the witness stand with you?

A. They're for protection.

Q. Protection from what is that?

A. From evil.

MR. GILDIN: I guess for present purposes, since we cannot offer those into evidence, nor do we intend to, I would just ask the record to reflect that Mr. Roy, in fact, has two feathers at the witness stand with him.

BY MR. GILDIN:

Q. All right. Mr. Roy, at Paragraph 13 of the comprehensive statement of undisputed facts, it states that on January 1, 1982, Stephen J. Roy began receiving cash assistance and medical assistance for himself and his two daughters, Renee and Little Bird of the Snow.

Did you provide a Social Security number for Little Bird of the Snow at that time?

A. No. I told them I couldn't do that.

[78] Q. Why was that, generally?

A. I felt that this number would rob her spirit.

Q. Did you apply for a Social Security number at that time?

A. No.

Q. I'd like to read now to you from Paragraphs 15 and 16 of the statement of undisputed facts.

Paragraph 15: "On April 27, 1982, DPW," that is, the Pennsylvania Department of Public Welfare, "advised Mr. Roy that he had failed to provide a Social Security number of Little Bird of the Snow."

Paragraph 16: "DPW stated that a Social Security number is required by federal and state statutes and regulations as a condition of eligibility for assistance for Little Bird of the Snow."

Paragraph 17: "Mr. Roy advised DPW that he would not provide a Social Security number for Little Bird of the Snow alleging that it was contrary to his religious beliefs as a native Abenaki."

Mr. Roy, could you explain why obtaining a Social Security number for Little Bird of the Snow would be contrary to your religious beliefs as a native Abenaki?

A. Yes. Because we felt that this number would be used to rob her of her ability to have greater power in that this number is a unique number. It serves unique purposes. [79] It's applied to her and only her; and being applied to her, that's what offends us, and we try to keep her person unique, and we try to keep her spirit unique, and we're scared that if we were to use this number, she would lose control of that and she would have no ability to protect herself from any evil that that number might be used against her.

Q. Do you have an objection to all numbers?

A. No, just—not all number, no. Just the manner this number is used because it represents a great evil to us.

Q. This belief that it may be evil, does this have any foundation in your understanding of native legend or tradition?

MR. HIRT: Your Honor, I want to object again. I think he should state what the basis for his objection is, not to be led by his counsel to that conclusion.

MR. GILDIN: Well, Your Honor, it's been undisputed that he has claimed that his belief is religious in nature and he's explained the basis for the belief itself. I don't think we're opening up any new area here. We're just trying to find out if that religious belief, the admitted claim that it's religious in nature ties in any way to legend and tradition.

THE COURT: I'm going to sustain the objection to the precise question.

BY MR. GILDIN:

Q. Could you tell us what sort of—

A. Well, we—

[80] Q. Sorry. I have to ask the question before you answer it.

What sort of informtion do you rely upon, if any, in reaching this belief?

A. Yes. We have—I've heard of a legend among us that tells of something that is called Katahdin.

THE COURT: Spell that, please.

THE WITNESS: It's K-a-t-a-h-d-i-n.

THE COURT: K-a-t-a-d-i-n?

THE WITNESS: No, there's an "h" in there. It's K-a-t-a-h-d-i-n.

This is something that when our people were sufficiently in danger would arise, and that your people would bring this about by endangering our people; and that this thing would rise up, and this evil that we consider the great evil would have a piece of every living thing in it and that it would endanger every living thing, and we do see some basis in this in that there's—you know, we do have nuclear weapons that can destroy this world, and you are using nuclear plants that

you cannot control; and that's one element of this belief, that you'll create this and not be able to control it.

BY MR. GILDIN:

Q. How does the Social Security number tie into that legend or belief?

A. There's three elements in this legend and that the [81] three evils will merge into the great evil, and we see great evil and the three evils as being one, the use of the computers and that you teach your children now and they go to play these video games, and you teach them to kill and destroy and to get a high score; and we see the use of your society now, they're increasing the computerizing of your weapons and that when you go into combat now, you will not have to kill your enemy and watch him suffer and bleed as a human being, but rather you might see just a collection of dots on your video screen as blown up, and that's the kind of sterile killing that I don't think—you know, I think that's going to make your people capable of raising Katahdin is that attitude.

Q. You said there were three evils. You've cited the first as the computers.

A. Yes.

Q. There are others?

A. The second is the use of the nuclear weapons and the nuclear plants, and these things that you dig up out of the ground were put into the ground for the purpose that they were never meant to be tampered with. They're great evils.

Q. What's the third element of this?

A. That's the attitude of your people in using these machines and the computers.

Q. Just for clarification, where does the Social Security number tie into this notion of the three evils?

[82] A. It's used by the computers. To a large extent, it's the most widely shared number in the computers, and this fact that it effectively—I don't know the term for that—I would consider it robs your people's spirit. I think your psychologists call it dehumanization.

THE COURT: I don't know that we have the date of birth of Little Bird of the Snow. What was the date of birth?

THE WITNESS: That's 12-26-80.

THE COURT: Okay.

BY MR. GILDIN:

Q. Now, Mr. Roy, do you have a Social Security number?

A. Yes.

Q. Why is that, if you have this religious objection to providing one for Little Bird of the Snow?

A. I believe I had that done back in 1971, back before I was even aware of too many—I was hardly aware of anything at that time. I got that so I could work.

Q. Now, it's been agreed that you continue to provide this number to the Department of Public Welfare, to the United States Department of Health and Human Services and the United States Department of Agriculture.

Now that you've become aware, why is it that you continue to provide your Social Security number to these governmental agencies?

A. Because it's already been used. I've already lost [83] that control of it, so it can't do us any harm.

Q. There wasn't any harm—I'm sorry.

A. The harm has already been done. It can do us—it can't do us any greater harm.

Q. Now, does your elder daughter, Renee, have a Social Security number?

A. Yes.

Q. And you've provided this number to the defendants?

A. Yes.

Q. Now, why is it that Renee has a Social Security number?

A. That was before we became—you know, became aware, of you know, of how this thing might be used to rob her spirit, and at that time, they had required it at that time.

Q. Why is it that you continue to provide that number for Renee after understanding the great evil that could come from this number?

A. It's already been used. It can't do her any further harm. It's already done its harm.

Q. Paragraph 18 of the comprehensive statement of undisputed facts: "On September 17, 1982, Mr. Roy's cash

assistance under Aid to Families with Dependent Children was reduced because DPW," the Pennsylvania Department of Public Welfare, "held Little Bird of the Snow ineligible for benefits."

Paragraph 19, it has been agreed that: "Similarly, [84] DPW," that is, the Pennsylvania Department of Public Welfare, "discontinued medical assistance for Little Bird of the Snow."

Paragraph 20: "The sole basis for these actions was Mr. Roy's refusal to obtain a Social Security number for Little Bird of the Snow."

Mr. Roy, after these benefits were reduced on September 17th of 1982, did you then provide Little Bird of the Snow's Social Security number so that you could get those benefits back?

A. No, because I couldn't.

Q. Paragraph 27 of the comprehensive statement of undisputed facts—I'm sorry. Paragraph 21: "On June 16, 1983, the Pennsylvania Department of Public Welfare held a hearing on Mr. Roy's appeal from the reduction of cash assistance and discontinuance of medical assistance for Little Bird of the Snow."

Paragraph 22: "On July 28, 1983, the Department of Public Welfare Hearing Examiner decided Mr. Roy's appeal and held that Mr. Roy's refusal to provide a Social Security number for Little Bird of the Snow is based upon a religious belief that is sincerely held. She also found that DPW had a compelling state interest in requiring a Social Security number for Little Bird of the Snow."

Paragraph 23: "On July 28, 1983, the DPW Hearing Examiner decided that Mr. Roy's appeal be denied and refused to [85] restore the cash assistance or medical assistance for Little Bird of the Snow."

Paragraph 24: "DPW affirmed the order of the Hearing Examiner on July 29, 1983."

Paragraph 25: Except for his refusal to provide a Social Security number for Little Bird of the Snow, Mr. Roy has met all the requirements for eligibility for cash assistance and medical assistance for Little Bird of the Snow at all times since January 1, 1982," which is the date these benefits began.

After your appeal was denied and they refused to restore those benefits, did you then provide a Social Security number for Little Bird of the Snow?

A. No, I can't.

Q. Paragraph 30—no, I'm sorry. Stipulation Paragraph 27: "In September 1982, Mr. Roy was denied $33 and, since October 1982, Mr. Roy has been denied $66 per month as a result of DPW's discontinuance of Little Bird of the Snow from cash assistance."

Paragraph 28: "Since September 17, 1982, Mr. Roy has paid $40.50 for medical and dental care for Little Bird of the Snow. If DPW had not discontinued Little Bird of the Snow from medical assistance, these expenses would have been paid by the Pennsylvania Department of Welfare and the United States Department of Health and Human Services."

Mr. Roy, by my calculations, through this month, [86] you have lost $1,393.50 in welfare benefits due solely to your refusal to provide a social Security number for Little Bird of the Snow. Why is it that you're willing to forego these benefits?

A. I can't—I can't use this number for her. She has to use that for herself. That's her decision.

Q. Now, should Judge Muir decide this case against you, would you then provide a Social Security number for Little Bird of the Snow to get these benefits?

A. I cannot.

Q. Just for clarification in terms of eligibility, it's been agreed, as I previously pointed out at Stipulation 25, that except for your refusal to provide the Social Security number for Little Bird of the Snow that you met all requirements for eligibility for these benefits. This stipulation was entered into, I believe, on May 1st of 1984.

Have you been employed since then?

A. No.

Q. Has your wife been employed since then?

A. No.

Q. Let's talk for a moment about the food stamps, since we do have these two separate programs.

It's been stipulated at Paragraph 29: "Stephen J. Roy and Karen Miller have been receiving food stamps from the

Pennsylvania Department of Public Welfare and the United States [87] Department of Agriculture, pursuant to the federal-state program of food stamps to low-income households."

Paragraph 30: "On or about May 26, 1983, the Pennsylvania Department of Public Welfare advised Mr. Roy and Ms. Miller that it intends to discontinue food stamps for Little Bird of the Snow because they failed to provide a Social Security number for Little Bird of the Snow."

Paragraph 31: "DPW asserted that a Social Security number is required by federal and state statutes and regulations as a condition of eligibility for food stamps for Little Bird of the Snow."

Paragraph 32: "Mr. Roy advised the Pennsylvania Department of Public Welfare that he would not provide a Social Security number for Little Bird of the Snow, alleging that it was contrary to his religious beliefs as a native Abenaki."

Just as a point of clarification, Mr. Roy, are these the same beliefs that we've been talking about here that you lodge with respect to the other welfare benefits?

A. Yes.

Q. Your answer was yes?

A. Yes.

Q. Thank you. Paragraph 33, Your Honor: "Except for their refusal to provide a Social Security number for Little Bird of the Snow, Mr. Roy and Ms. Miller meet all the requirements for eligibility for food stamps for Little Bird of the [88] Snow."

Mr. Roy, if Judge Muir permits the government to terminate food stamps for Little Bird of the Snow if you continue to refuse to provide a Social Security number for her, will you then provide that number?

A. I can't. I cannot.

Q. Let's talk a little bit about alternatives. Did anyone ever give you a reason why Little Bird of the Snow was removed from the cash grant and medical assistance or was threatened to be removed from food stamps other than your failure to provide a Social Security number for her?

A. No.

Q. Did you ever offer any alternative means to keep receiving these welfare benefits?

A. When I spoke to Mr. Cillo at the local welfare department—

THE COURT: Was the name Cillo?

THE WITNESS: Yes, Cillo.

THE COURT: C-i-l-l-o?

THE WITNESS: Yes.

BY MR. GILDIN:

Q. What did you explain to Mr. Cillo, or what did you offer to Mr. Cillo?

A. I had asked him if there was any other way that this could be done, or if there was any other way that that [89] requirement could be satisfied, and he informed me: No, that there was no way he could change the law. And he became irrational and insulted us.

Q. What do you mean, "he became irrational and insulted you"? Can you be more specific?

A. He told me about how he had fought in the second world war and how he—

MR. RESSLER: Your Honor, I think I'll object on hearsay.

MR. GILDIN: Your Honor, this isn't offered for the truth of the matter asserted; it's offered for the fact that it was stated and its effect on Mr. Roy.

THE COURT: It doesn't seem to me to be hearsay, and I'll overrule the objection.

BY MR. GILDIN:

Q. Could you start again and explain what specifically Mr. Cillo said when you wanted to know if there was any alternatives?

A. He said no, that he could not change the law, and he went into how he was in the second world war and had been shot at and stuff and how he had earned his right to be in this land and that we had no right to be here.

Q. When you say "we had no right to be here," what did you take that to mean?

A. Our family.

[90] Q. Did you make any specific offers of alternatives? You talked about the question of: Were there any alternatives? Did you suggest any specific options?

A. I asked them if they could use my own Social Security number for her, and they said no, that would not be acceptable.

Q. Now, why, Mr. Roy, if you object to providing a Social Security number for Little Bird of the Snow, would you offer your number to be used to identify her?

A. Well, it's the aspect of this number being unique to a person that bothers us and that you're to have your own unique personality, and it being unique to us, it's already done its harm; and by it being shared with her, it wouldn't be unique to her. It would be like in between her and this number, and we believe it would effectively shield her from this harm.

Q. What was the response to your specific offer to use your Social Security number?

A. They told me that wouldn't be acceptable, and they threatened to cut us off at that point.

Q. Did they explain what was wrong with the concept of using your Social Security number?

A. No. They just said that they had the regulation, and she had to have her own Social Security number.

Q. Did anyone ever offer to work with you to look for other alternatives?

[91] A. No.

Q. Now, are you still willing to cooperate to find some alternative to receiving these welfare benefits other than providing Little Bird of the Snow's Social Security number?

A. I've been willing to all along.

Q. And you remain willing to to this date?

A. Yes.

Q. Your Honor, Stipulation 57: "Little Bird of the Snow's name and birthdate were entered into the computer which the Pennsylvania Department of Public Welfare and the United States Department of Health and Human Services use to determine eligibility for welfare benefits."

Stipulation Paragraph 60: "Little Bird of the Snow's name and birthdate were entered into the computer which the Pennsylvania Department of Public Welfare and the United States Department of Agriculture use to determine eligibility for welfare benefits."

Mr. Roy, do you have any religious objection to this alternative; that is, to using Little Bird of the Snow's name rather than her Social Security number?

A. Well, we gave her that name particularly to protect her from any kind of evil, and I don't see where she would be threatened by that.

Q. So, could you please just answer whether or not you do have the objection?

[92] A. No.

Q. Would this be true even if this computer, through some mechanical means, translates her name into numbers for its own internal purposes?

A. Well, like I said, we've given her that name as a unique name in order to protect her from the kind of evil. I don't know how they would do that.

Q. Paragraph 62 of the undisputed facts: "The AFDC," that is, Aid to Families with Dependent Children, "checks and food stamps received by all program participants are and would continue to be numbered."

And this "would continue to be numbered," I take it to mean regardless of the outcome of this action.

Do you have any objection to receiving food stamps that are numbered or AFDC checks that are numbered?

A. They don't represent as great an evil as this number does to us.

Q. So, do you have any objection to that?

A. I don't have any knowledge of how they do that or anything.

Q. Do you have a religious objection to receiving food stamps which are numbered?

A. No, not specifically, no.

Q. Mr. Roy, prior to the time that cash assistance and medical assistance were terminated for Little Bird of the Snow [93] in September of 1982, did you have any extra money around after paying for necessities? This is before the termination.

A. Well, we had a little bit of money, like to take—you know, to be able to make it out to certain mountaintops and waterfalls where we could have observances.

Q. How much cash assistance have you been receiving per month since Little Bird of the Snow was removed from the cash assistance program?

A. A total for the household has been $335.00.

Q. This is for your entire family, for the four persons, but you're receiving benefits on behalf of three now?

A. Yes.

Q. How much in food stamps are you currently receiving?

A. $179.00 a month.

Q. This again is for the family of four—

A. Yes.

Q. —and Little Bird of the Snow currently is still receiving food stamps.

A. Yes.

Q. By my arithmetic, including the food stamps, you're receiving benefits of $514.00 per month.

A. Yes.

MR. GILDIN: I'm sure defense counsel will correct me if that's not correct. Is that correct?

[94] MR. RESSLER: Yes.

BY MR. GILDIN:

Q. How much rent are you currently paying per month?

A. $77.00 per month.

Q. Is this in subsidized housing?

A. Yes.

Q. Do you have any other fixed expenses besides the $77.00 rent; and by fixed, I don't mean that they just happen every month but rather the amount remains the same every month?

A. Yes. It would be the telephone bill.

Q. How much is the telephone bill fixed per month?

A. I think it's $10.50 per month.

Q. Any other expenses where it remains the same?

A. Yes. Our garbage. That's $27.00 a month.

Q. So, between the rent, the telephone and the garbage removal, I come up with a total of $114.50; is that correct?

A. Yes.

Q. Therefore, if you take the $514.00 per month in benefits you're currently receiving and subtract from that the fixed expenses for rent, phone and garbage, that leaves you $399.50 for all expenses other than the rent, phone and gar-

bage, is that correct, and that's something less than $100.00 a week?

How do you manage to live on less than $100.00 a week for all expenses other than rent, phone and garbage removal?

[95] A. We go from one crisis to another.

Q. What do you mean by going from one crisis to another?

A. Toward the end of a month is when we start to run low and we have to turn to other agencies to see if we can receive assistance, like getting food.

Q. What sort of agencies—

THE COURT: Like what?

THE WITNESS: Like the American Rescue Workers and the Salvation Army and the Food Bank locally.

BY MR. GILDIN:

Q. Why did you have to ask them for food?

A. Because we don't have the resources at the end of the month.

Q. To feed your family.

A. Yes.

Q. These are private agencies rather than governmental agencies.

A. Right.

Q. Have they always been willing to provide you with the food you need to feed your family?

A. No. They say that they can only help you once every six months.

Q. How frequently were you showing up there?

A. Well, just about the end of every month.

[96] THE COURT: Did you ever go down to St. Anthony's?

THE WITNESS: Yes. We were excluded from there two years ago.

THE COURT: Why?

THE WITNESS: Because my wife, she wore a halter top one day, and it come down to her navel, and they told her that was indecent and that she didn't have to be around there anymore.

BY MR. GILDIN:

Q. Now, you've been running out of food even before food stamps have been terminated for Little Bird of the Snow.

A. Yes. We've been able to supplement to some degree with wild foods, but I just can't—we just can't meet it.

Q. Have there been any other changes that you had to make in your life when this $66.00 a month and the medical assistance was removed, at least terminated for Little Bird of the Snow?

A. It's made it pretty hard for us to be able to get out to have our observances at any of the spots that we were used to.

Q. Why is that? Why can you no longer get out to any of these holy spots?

A. There's no gas or no way to get there.

MR. GILDIN: Your Honor, at this point in time, I'd like to introduce into evidence Plaintiffs' Exhibits One, [97] Two and Three, which are the receipts for the medical care that indicate or that will total to the $40.50—

THE COURT: Before you do that, are they agreed to by the other side?

MR. GILDIN: Counsel had no objection at our pre-pre-trial conference to their authenticity or their admissibility.

THE COURT: I understand, but the normal way to do it would be to show the exhibits to the witness and have him identify them, and then we'll take all the exhibits at the end of his testimony in one batch, and it will save quite a bit of time, I believe.

MR. GILDIN: I must have misunderstood. I thought by going through this process at the pre-pre-trial conference, that had all been established; but I'll be happy to lay the proper foundation, Your Honor.

May I approach the witness?

THE COURT: Yes, sir. I don't think there's any problem with counsel for a witness approaching the witness. It's when the other side approaches the witness that you have problems.

MR. GILDIN: Okay, thank you.

BY MR. GILDIN:

Q. Mr. Roy, I show you what have been marked as Plaintiffs' Exhibits No. 1, 2 and 3. I've got a copy for [98] opposing counsel.

THE COURT: We really ought to have copies of these, too.

MR. GILDIN: I've got them for the Court as well, Your Honor.

THE COURT: Thank you. Now, what one are you handing up, No. 1?

MR. GILDIN: One, two and three; all of them are receipts, Your Honor.

THE COURT: All right.

BY Mr. GILDIN:

Q. Mr. Roy, could you please identify what Plaintiffs' Exhibits One through Three are?

A. Exhibit No. 1 is a prescription that we paid for antibiotics.

Q. For whom was that prescription?

A. Little Bird of the Snow.

Q. How about Plaintiffs' Exhibit No. 2?

A. That's for our visit to the dentist where she was scheduled to have her teeth cleaned.

Q. How about Plaintiffs' Exhibit No. 3?

A. It's another scheduled visit to the dentist to have her teeth cleaned.

Q. Now, did you pay for all of these expenses out of your own pocket?

[99] A. Yes, we had to.

Q. Was this after medical assistance had been terminated for Little Bird of the Snow?

A. Yes.

MR. GILDIN: Your Honor, at Paragraph 28 of the stipulations, defendants had agreed that these expenses would have been paid for by the Department of Public Welfare and the United States Department of Health and Human Services had Little Bird of the Snow not been terminated from medical assistance.

May I check with co-counsel for a moment?

THE COURT: Yes, sir.

MR. GILDIN: Your Honor, at this point in time, we'd move for the admission of Plaintiff's Exhibits One through Three, and we have no further questions on direct examination of Mr. Roy.

THE COURT: All right. I think we ought to wait and take the exhibits after the witness has been cross examined.

MR. GILDIN: Fine. Thank you, Your Honor.

THE COURT: I think this would also be an appropriate time to take our luncheon break. We really need an hour and a half to process other work. So, we'll ask you to come back in an hour and a half. It's now 12:20. That clock is wrong.

MR. GILDIN: Thank you, Your Honor.

(Recess taken from 12:20 to 1:50 p.m.)

THE COURT: Please be seated. Mr. Roy, you may [100] take the stand.

(Stephen J. Roy resumed the witness stand.)

THE COURT: You may go ahead, sir.

CROSS EXAMINATION

BY MR. HIRT:

Q. Mr. Roy, my name is Ted Hirt. I represent the federal defendants. I'd like to ask you a few questions if that's all right.

First of all, Mr. Roy, I'd like to get a little bit more of your family background for the record. In what year were you born?

A. In 1956.

Q. Where were you born?

A. Concord, New Hampshire.

Q. In what year was Renee, your daughter, born?

A. 1978.

Q. Approximately what month?

A. March 13, 1978.

Q. I think your prior testimony was that Little Bird of the Snow was born December 26, 1980.

A. Right.

Q. That's the day after Christmas; isn't it?

A. Yeah.

Q. Okay. Does she get gifts on both days or just on [101] the birthday?

A. Well, we really don't celebrate Christmas. I just—you know, we kind of make it for her birthday.

Q. What year did you marry Karen Miller?

A. Well, that would have been in—somewhere around '79. It wasn't just an outright marriage at one time.

Q. In other words, are you saying that there wasn't an actual wedding ceremony? Is that what you mean?

A. No. See, we made an agreement first, and then we went through a trial period of where we moved in with her mom, and when I moved out then, we moved away from her mom, we considered ourselves married at that point; and I've written the chief to let him know about this.

Q. If I understand you, then, it was at the end of the trial period that you both considered yourself married?

A. Right.

Q. Okay, and is that what you mean when you said 1979?

A. Right.

Q. Approximately how long was the trial period in terms of months, if you can recall?

A. Four months.

A. Again, would that have been in the calendar year 1979?

A. Right.

Q. Did you ever have any civil wedding ceremony?

[102] A. No.

Q. Were any of your grandparents alive when you were born?

A. My grandfather and my grandmother.

Q. Excuse me?

A. My grandfather and my grandmother on my father's side.

Q. On your father's side.

A. They've since died.

Q. In terms of your family tree, I want to ask you a few questions about your lineage.

First, is your mother still alive?

A. Yes.

Q. Her name is Marilyn Roy; is that right?

A. Right.

Q. Do you know, in terms of her background, whether she's full-blooded native American or half or can you estimate for us?

A. I've asked her that.

Q. Excuse me?

A. I've asked her that.

Q. What has she told you?

A. She's not too sure. You know, she's not very sure of that at all.

Q. Well, didn't you testify in the administrative [103] hearing that she was a quarter native American?

A. Like I said, she's not sure. If she had been the first born male in her family, she would have been eligible to go to Dartmouth College, which is where they have their program set up for native Abenaki. Again, I tried to find out more information about that from her, but she just doesn't know.

Q. Okay. But at the administrative hearing, you said that she was a quarter by descent; is that correct?

A. Possibly, yes.

Q. Has your mother said to what extent her parents, which would have been your maternal grandparents, were native Americans? Has she given you any information as to their lineage?

A. No.

Q. Now, on your father's side, his name is Harold Roy?

A. Right.

Q. To what extent is he native American? Full blood, half blood . . .?

A. He's considered a half blood.

Q. Half blood. Does that mean that his mother was not native American; is that your understanding?

A. Yes.

Q. So, in other words, your paternal grandmother would have been Caucasian, if I can use that term?

A. You're talking race. That's a very inexact [104] category to use.

Q. Would she have been non-native American, as you understand that term?

A. Yes, I think. I don't know. She was dead when I was born, on my father's side.

Q. I think from either the stipulation or the testimony, your grandfather on your father's side was a full-blooded American Indian.

A. Right.

Q. What was his name?

A. I only know him as "Gampa."

Q. As what?

A. Gampa.

Q. How do you spell that?

A. I didn't have to spell it then.

Q. How do you guess that you'd spell it?

A. G-a-m-p-a. That's all I knew him by.

Q. Do you know whether that stands for something in Abenaki?

A. I just thought he was my grandfather, you know, like grandpa, and we just called him "Gampa."

Q. So, in other words, your testimony is that you don't know what his actual name was.

A. No.

Q. Now, I think there's been a stipulation entered [105] that his father, who would have been your great-grandfather, was a tribal chief of the Abenakis.

A. Right.

Q. What was his name.

A. Thebe.

Q. How do you spell that?

A. T-h-e-b-e.

Q. T-h-e-b-e?

A. Yeah.

Q. Did he have any other name?

A. Not as far as I know. The only way I know that is our—some members of our family are buried on Dundee Mountain in New Hampshire, and that's where he is buried.

Q. In terms of your wife's side of the family, Karen Miller, do you know what her degree of Indian blood is, if I can use that term?

A. Karen?

Q. Karen Miller, your wife.

A. No, I don't know if she has any.
Q. You don't know if she has any.
A. I don't know.
Q. Have you asked her?
A. Yes, but I don't get along with her family too good.
Q. Well, my question was: Have you asked her?
[106] A. Yes.
Q. What does she say?
A. She doesn't know.
Q. Do you think that, in fact, she is native American at all?
A. Well, that's—the people at the Three Rivers Council, they've asked me that question, if I considered her, by reason of our being married and being in our family, if she was an Indian, and they said yes, they do consider that being an Indian.
Q. You meant that they consider that being Indian.
A. Yes, they do consider that. Being an Indian is a matter of identity more than it is a matter of race as far as to them, and they consider her because she identifies with us to be within an Indian family and she's Indian herself.
Q. So, the Three Rivers Council, according to what you know, is concerned more with how someone says they affiliate themselves in terms of identity, not whether they actually are Indian or not Indian in the—if I can call it—biological sense.
A. I had to—my brother sent them documentation to get me registered there; and as far as Karen, no, they didn't.
Q. Now, I think that you testified that the trial period, which preceded what you've defined as being married, that you lived with Karen's mother; is that right?
[107] A. Right.
Q. It was your testimony that that was consistent with Abenaki custom, to live with the future mother-in-law; is that correct?
A. That's how we saw it, yeah.
Q. You were born in Concord, New Hampshire, according to your testimony.
A. Right.
Q. How long did you live there?

A. About maybe two and a half, three years. I was very young.

Q. Where did you move to from there?

A. Norfolk, Virginia.

Q. So, that would have been, let's say, 1969, roughly.

A. Yeah, somewhere in there.

Q. From Norfolk, Virginia, how long did you stay in Norfolk, Virginia?

A. Until I was 15.

Q. Which would have been in 1971?

A. Right.

Q. Does that sound right?

A Right.

Q. In 1971, where did you move to?

A. Well, I moved here in '72 from Norfolk, Virginia.

Q. So, you went from Norfolk, Virginia, to [108] Williamsport, Pennsylvania.

A. Right.

Q. Is the residence address that you gave in your opening testimony, Erie Avenue, is that where you moved to when you came to Williamsport?

A. No.

Q. You lived somewhere else in Williamsport before that addr- s.

A. Right.

Q. What is your present address again, just so that I'm clear on that?

A. 545 Erie Avenue.

Q. Are you moving from that residence in the near future?

A. Yeah. I may be. It's not exactly sure at the moment, but I have an opportunity.

THE COURT: Now, wait a minute. You say if you have an opportunity?

THE WITNESS: No. I said I have an opportunity to go to Penn State, so I may be changing that.

BY MR. HIRT:

Q. So, you'll be going to Penn State University?

A. I should be, yes.

A. So, you expect, if you can, to move from Williamsport to somewhere near Penn State; is that right?

[109] A. Right.

Q. What county is Penn State in?

A. Centre.

Q. How do you spell that?

A. C-e-n-t-r-e. See, I've already been accepted into Penn State, but it's a matter of me being able to move there now. They're arranging an address.

Q. I think from your prior testimony you indicated that your parents, Harold and Marilyn Roy are Roman Catholics; is that correct?

A. Right.

Q. Is that their current religious affiliation, to your knowledge?

A. Well, my mom, I know she's not Catholic anymore. I don't what she is anymore, but my father is, yes.

Q. When you were growing up, were they Roman Catholics?

A. Yes.

Q. Were you baptized in the Roman Catholic Church?

A. Yes, I was.

Q. Did you receive confirmation?

A. Yes, I did.

Q. Can you pinpoint exactly when your first communion would have been, how old you were?

A. My first communion, that would have been about '82 [110] or '83.

Q. When you were approximately, let's say, eight or nine?

A. No, I was six or seven.

Q. Younger. So, we'll say, just to estimate, 1982. How long were you a Catholic in terms of considering yourself to be a Catholic?

A. Well, we started getting away from it, like as a family, when I was around eight or nine; and then, from that point on, I wouldn't have considered myself a Catholic because I didn't keep up with the worship or attending church on Sunday.

Q. Was your wife, Karen Miller, brought up in a particular religion?

A. Not that I'm sure of, no.

Q. So, in other words, at the present time, does she attend any church service?

A. No.

Q. Do you attend any Catholic Church services intermittently or visiting your family?

A. No.

Q. I think in some of your testimony you were talking about using the term "the father"; is that right?

A. Correct.

Q. In your understanding of what you consider to be your religion, do you consider that, the father to be a god; is [111] that your understanding?

A. We call that the creator. The father, creator; it's interchangeable because it's thought to be the father of life.

Q. Do you believe in only one single god? In other words, are there other what I would call supernatural being, other than that father that you've identified?

A. Well, I believe that there's—the father is the creator, and other than that, there are powers that influence—that can influence you or that can change things, yes, if that's what you're asking me.

Q. Yes. Now, you testified a little earlier about a gentleman you met who I think you described as a born-again Christian; and if I understand your testimony, he had a discussion with you about Social Security numbers; is that right?

A. Well, not particularly the Social Security number. He was speaking on how someday there will come a time when you will need a number in order to get food or to get money to to like be a part of this system.

Q. Approximately when, roughly, was that conversation? What year, can you recall that?

A. That would have been in '75, 1975.

Q. So, you were already in Williamsport at that point.

A. Right.

Q. If I understood what you related about this [112] individual, did he indicate that if people had these numbers, they wouldn't be able to go to heaven; was that his testimony?

A. That's particularly what he told me, that they would be barred from entering heaven because the anti-Christ had given them this number.

Q. I think it was your testimony that you don't believe that, that the number does not damn you, if I can use that term.

A. I believe elements of that, in that there is a great evil behind that number; but as far as his particular belief, no, I don't believe that. I have my own belief on this.

Q. In terms of great evil, you wouldn't go as far as he would to say that it—

A. He calls it the anti-Christ. I would call it the great evil.

THE COURT: Counsel, I want to caution you not to talk when the witness is talking because the court reporter cannot get two people at once, and that results in that nine times out of ten she can't even get one. So, try to avoid that.

MR. HIRT: Fine. I'll try to do that, Your Honor.

BY MR. HIRT:

Q. Can you recall, Mr. Roy, what event prompted you to actually get a Social Security number? Was it in connection with the dealings of a particular employer or a government, or how did that happen?

[113] A. It was required for me to work, and when I went to seek a job when I turned 16, that would have been in '71 or '72, I was required to have the Social Security number in order to work.

Q. Were you in Williamsport at that time?

A. No. I believe I had that done in Virginia, and then I moved here shortly after I got my Social Security number.

Q. What job did you have in Norfolk that you had to get the number in order to get?

A. Well, I didn't get the job. I was trying to get the job at the time, and they told me I would need a Social Security number.

Q. What kind of a job were you trying to get?

A. A waiter's job or a busboy, whatever they call it.

Q. In terms of your looking for work, when you applied for employment, based upon your testimony, it would be my understanding that you would give your Social Security

number to a prospective employer, if that's on the application form.

A. Right now?

Q. That's right, right now, at the present time.

A. Yes.

Q. Approximately how many occasions in the last year or so have you filled out job applications in which you have filled in your Social Security number?

A. Job applications?

[114] Q. That's right. Just an estimate; I don't need an exact number.

A. I'd say maybe—I don't know. There's so many other forms where they require that.

Q. When they require the Social Security number?

A. Right.

Q. Who else, other than employers?

A. Well, the welfare department, to Penn State, the university itself.

Q. The university.

A. Right.

Q. You mean Penn State University?

A. Right.

Q. Have you given your Social Security number to Penn State University?

A. Well, you have to.

Q. Well, that's not my question.

A. I have.

Q. You have.

A. Right.

Q. Have you applied for unemployment compensation at any time since you've been in Williamsport?

A. Yes. That would have been back in 1969.

Q. Do you recall whether you gave a Social Security number then?

[115] A. Well, you have to. I did.

Q. In terms of the Social Security number, if I understand your testimony, what you object to is that you can't control the number.

A. No. It's the uniqueness of the number itself and how it applies to you and your inability to control that.

Q. Well, is it two things about the number that you object to?

A. No, just that you're unable to control that, and the number is unique to you, and it robs you of anything that's unique about you, your personality and your spirit.

Q. Well, what do you mean by that you can't control it?

A. Well, in order to have greater power, you have to have control over all aspects of your personality, and that's where this number offends us. You can't control the uses of it. Once you use it, anybody can use it, and we're scared that someday this might be used by some great evil to gain a hold on our daughter's spirit. That's why we object to that.

Q. But at the present time, are you aware of any great evil acting on your daughter's spirit?

A. Right here.

Q. Excuse me?

A. Well, what we're going through here.

Q. You mean that you consider the trial itself part of [116] a great evil.

A. No, but just all the justification that's been put forth for her to be required to have this number and all the various things and the way these numbers are used.

Q. Well, as I understand your testimony, then—

A. I mean, they're used in the computers, and this is one of the elements of the great evil, as we believe it.

Q. I want to ask you about computers in a minute, but if I understand what you're saying, your wish would be that you have as much control over your life as possible; isn't that correct?

A. Yes. All traditionalists believe that.

Q. All traditions believe that?

A. Traditionals.

Q. Traditionals?

A. Yeah.

Q. Would you accept that non-traditionals would believe that as well?

A. Some may. I don't know.

Q. But in terms of the present point in time, May 1984, if I understand your testimony, you're not aware at this point in time of a great evil having affected your family because of

Social Security numbers. This is something you fear in the future; is that right?

A. No, I can see where it's affected me and my [117] daughter and my wife, if that's what you're asking me. That's why, where I stated earlier, this has already been a harm to us; and by her using our number, she wouldn't be harmed because it would no longer be unique to her. We would be acting as a kind of a shield between her and this number.

Q. Well, if I understand your testimony, you continue to allow the use of your number because no greater evil can be inflicted upon you, your wife or Renee at this point in time or from this point forward.

A. It's already done its harm.

Q. I'm not too sure from your prior testimony, but when did you get a Social Security number for Renee, what year approximately?

A. I think that was in 1978, when Karen had her at the hospital there.

Q. So, Renee was born, as I understand it, on March 13, 1978.

A. Right.

Q. You believe that the Social Security number was gotten for her close in time after her birth.

A. Right.

Q. So, did you and your wife both make that decision to get her number?

A. For Renee to get the Social Security number?

Q. Yes.

[118] A. No.

Q. Who made that decision?

A. Karen did.

Q. Did she ask you before she did that?

A. Yes, but—you know, we—we were pretty uncertain of our beliefs at that time. So, I didn't really know how that number could be used or how this technology could rob her spirit at that time.

Q. So, what your testimony is is that in 1978, you didn't have the perception of this great evil; is that what you mean?

A. I had the perception of this great evil, but I didn't know the method that this evil would be used on people.

Q. So, by "method," are you talking again about the computer?

A. Yes.

Q. Well, let's turn to your concerns about computers for a minute. You've talked about in your direct testimony that computers can be used potentially, I suppose, to set off World War III, is that correct, because they can be linked to nuclear weapons; or how would you articulate that?

A. Well, they're already established there. It's already well established that there's been—you know, that these things could do that, that you do have your computers controlling these nuclear weapons and plants, and these are [119] still things that you can't control by these computers.

Q. But, of course, the computers that deal with nuclear weapons don't have anything to do with the computers that we're concerned about in this case.

THE COURT: Counsel, wait a minute, there's no question. Ask him a question.

BY MR. HIRT:

Q. Would you agree with me that the computers that deal with our nuclear weapon systems have nothing to do with the computers that are involved in your welfare and food stamp benefits?

A. Well, I believe there's three elements to that great evil, and one is the people—the attitude toward using these computers to do things like that.

Q. Okay.

A. The other being linked with the nuclear weapons and plants, things that you can't control.

Q. So, if I understand your testimony, your concern is not so much the mechanics, but it's what's in the heads of these individuals that concern you; is that right?

A. No. It's the attitude that these things are put forth with, you know, as far as how a person looks at themselves when this is applied to them is what concerns me.

Like I said, your people have a name for this. It's called dehumanization. To us, it's called robbery of the [120] spirit.

I mean, to take away something that's human to a person or unique to a person is to rob them of their spirit.

Q. So, if I understand what you're trying to clarify, the computer itself is not the problem in your mind, or is it?

A. It's one element of the problem.

Q. So, in other words, if you had your wish, you would hope that computers would not be used to control your family, if I can use your term; is that right?

A. That's already been done.

Q. But if you had your wish, isn't that your wish?

A. It's already controlling our family. My only wish is that my daughter be allowed to make this decision for herself.

Q. But in other words, Mr. Roy, it's not so much that Little Bird of the Snow would have to have a Social Security number, it's that however your daughter is identified, the people in this computer system will use it to control her; isn't that right?

A. Well, they use this number to do that. That's what offends us.

Q. But if they were going to run a system in which your family participates, wouldn't you be upset that they were using any sort of information on your family that identifies each one of you as individuals?

A. To some degree.

Q. To some degree.

[121] A. To some degree, yes.

Q. In terms of your daughter's name, Little Bird of the Snow, is the mere speaking of that name a sacred act?

A. It can be.

Q. Would it be your testimony then that someone speaking her name or using her name improperly might rob her of her spirit?

A. No. She was given that name to protect herself and be able to invoke an ally to protect herself. You know, that power through her name would be specific to her only. That's the whole purpose of her having that name.

Q. Now, does Renee have that same power in her name?

A. No.

Q. I take it that you don't have that power in your name?

A. No. Renee has a different name. It's because I'm of mixed French and Indian ancestry, and Renee has her name from that.

Q. But she is just as much a native American as Little Bird of the Snow.

A. Yes.

Q. In terms of your referring to the Abenakis, what's your understanding as to where that tribe originated?

A. My understanding?

Q. Yes. What is your understanding of that?

[122] A. My understanding would be like in the White Mountains.

Q. The White Mountains of New Hampshire?

A. Yes.

Q. Do you know whether they were in any other state?

A. Well, yes. Yes, they are.

Q. Well, let me ask you: What other states are you familiar with as being where the Abenakis lived, and I want to limit it to before the whites came in and maybe displaced them or they moved?

A. Before the whites came in, there was no states.

Q. I understand that.

A. It's something that's imposed from outside the tribes and from outside the people.

Q. I understand that, but my question is: In what geographic areas, which are now represented by states, were the Abenakis, other than the White Mountains of New Hampshire?

A. Well, at one time, I think Vermont and New Hampshire and parts of Maine, Connecticut, Rhode Island, Massachusetts.

Q. Do you make any distinction between Western Abenakis and Eastern Abenakis?

A. There are some things that differ as far as the language and the customs, but I, myself, no, I wouldn't make that division.

[123] Q. Now, the Three Rivers Council, is that an organization that deals with a particular tribe, or does it deal with native Americans who might belong to different tribes?

A. It deals with all tribes in this state.

Q. I think that your testimony has been that your daughters are enrolled on a reservation; is that correct?

A. Yes.

Q. What reservation?

A. That's Odanak Reservation.

Q. Where is that?

A. Quebec, Canada.

Q. The individual that you identified as a tribal chief, Al—how would you pronounce that?

A. Al O'Bomsawin.

Q. Where is he from?

A. Odanak.

Q. He's from Odanak, okay.

I think that from your description of your upbringing, you said that your parents had taught you to make up your own mind; is that right?

A. To have my own mind.

Q. To have your own mind, okay. Was that during the time that they were practicing Catholics that they were communicating this message?

A. Yes.

[124] Q. I take it from what your testimony has been that you have a similar philosophy in terms of bringing up your daughters; is that right?

A. I have a similar belief.

Q. Similar beliefs in the sense that each of your children should have their own minds; is that the term that you would like to use?

A. That they should make their own decisions.

Q. Make their own decisions, okay.

A. The way it was related to me was to have your own mind.

Q. But at this point in time, in terms of the Social Security number issue, you're making that decision for Little Bird of the Snow right now.

A. No.

Q. No?

A. I want her to make that decision for herself when she becomes capable of that.

Q. Well, in other words, you're saying that right now she's not capable—

A. I'm saying that I can't make the decision for her.

Q. But at the present time, you are taking a position so that later she can make up her mind; is that what you're saying?

A. Yes, if she chooses that. See, if I made the [125] decision now for her to have this number, there is no way that if she ever changed her mind or if she didn't want that, it would be there. It would already be done and the harm would be done.

Q. I think you said that you had gone to Minnesota to visit the pipestone monument and to get some pipe.

A. Yes, I did.

Q. Now, that pipestone monument, is that related to the Sioux tribe in any way, to your knowledge?

A. The Sioux, I guess it's considered within their territory or their grounds, but it was visited by all tribes. It's used by all tribes.

Q. What's your knowledge that it was used by all tribes?

A. Well, from what I know and from what I've heard, tribes would travel thousands of miles to obtain this stone.

Q. When you made up your mind about not providing the Social Security number, had there been any specific written texts that helped you form that belief?

A. I would say one, yes, one that I can recall right now.

Q. What was that?

A. It was a book by Doug Boyd, and it's on a man by the name of John Pope, a holy man among the Cheyennes.

Q. When did you read that?

[126] A. The name of the book is Rolling Thunder.

THE COURT: What is the name of the book?

THE WITNESS: Rolling Thunder.

BY MR. HIRT:

Q. What year did you read that book?

A. That would have been in late '79.

Q. I think you've also testified that you're willing to present alternatives to getting a separate Social Security number for your daughter; is that right?

A. Yes.

Q. If the Social Security Administration said, "We have a series of numbers that are available, and you can pick one

from a group," would that ease some of your concern over the lack of control over the number?

A. If I was to pick one number from a group of numbers?

Q. Yes.

A. No. It would still be that uniqueness, and that's the element that bothers us the most.

Q. So, if the government, on the other hand, said, "All right, we won't use Social Security numbers. We'll reissue a whole series of unique numbers," you wouldn't find that alternative consistent with your views either.

A. I don't understand that.

Q. In other words, if the government said tomorrow, [127] "We're going to abandon the Social Security number, and everyone will start from scratch with unique numbers."

A. With a number applying to each person?

Q. With a number applying to each individual, I take it your testimony would be that you would still be dissatisfied with that from the standpoint of your religious beliefs—

A. Yes.

Q. —as you term those religious beliefs.

A. Yes.

Q. Now, if the Social Security Administration indicated to you that when they do a data processing function with one of their computers that they enter into the computer not only—and let's assume now that your daughter did get a Social Secuirty number—that they entered into that computer not only her Social Security number but her name, Little Bird of the Snow Roy, would that ease your concerns?

A. No.

Q. Do you know whether the state welfare department already has a separate number that they identify Little Bird of the Snow Roy by, other than the Social Security number?

A. No.

Q. Would you be upset if you learned that that was the case?

A. Maybe a little.

Q. Maybe a little, okay. If I understand your [128] testimony, if there was a situation where a caseworker in Lycoming County wanted to find out whether your family, for whatever reason, might be getting, let's say,

unemployment compensation and they called, let's say, the people who keep the unemployment compensation records—let's assume that it's Harrisburg for the time being—and the person in Lycoming County—

MR. GILDIN: Your Honor, I'd object. It sounds like a string of hypotheticals to Mr. Roy. I've been quite patient with Mr. Hirt for the past hour, but I think he's just spitting a bunch of hypotheticals out, and I don't see the purpose of that.

THE COURT: Let him get the question out, and then object to it.

BY MR. HIRT:

Q. Let me start over. If there were a factual situation that assumed that Little Bird of the Snow had a Social Security number, and the situation was that you were living where you now live in Williamsport, and you had provided the number of Little Bird of the Snow, and the county welfare department made a phone call to Harrisburg and called the people at the unemployment compensation office in Harrisburg and said, "We have a family named Roy. Mr. Roy's Social Security number is such-and-such, his daughter's is such-and-such, and his wife's is such-and-such, do you have any Social Security numbers [129] that match? Go look at your manual file."

In other words, they had pieces of paper in a filing cabinet arranged by numbers.

MR. GILDIN: I'd object again. I'd also ask for clarification, if one of those numbers is supposed to be assigned to Little Bird of the Snow. You said "your daughter," and I'd like a clarification.

MR. HIRT: Well, I'm talking generically about both daughters. I think that's clear. I haven't finished my question.

THE COURT: He never finished it, and I don't understand it up to this point, so ask it again.

BY MR. HIRT:

Q. All right. If there were a situation that assumed that everyone in your family had unique Social Security numbers and they had been provided to the Lycoming County Welfare Department; the Lycoming County Welfare Depart-

ment makes a phone call to someone in Harrisburg who, let's say, has unemployment compensation records, and let's assume that those records are organized by Social Security number in a filing cabinet, and the person in Lycoming County says, "Please check your files for these numbers." Would you object to that type of system?

MR. GILDIN: I have the same objection, Your Honor, if he's finished his question.

MR. HIRT: I've finished my question.

[130] THE COURT: You have finished it?

MR. HIRT: I have finished it.

THE COURT: Do you understand the question?

THE WITNESS: He's asking me to assume it, and I don't know.

THE COURT: Well, wait a minute. Do you understand it?

THE WITNESS: I don't know.

THE COURT: What?

THE WITNESS: I don't know how to answer that question. I haven't experienced that.

THE COURT: Well, I don't fully understand it either.

MR. HIRT: Well, Your Honor, what I'm trying to get at is that I'm trying to take the element of the computer out for now to clarify the nature of the objection; and the hypothetical situation that I'm positing to Mr. Roy is that people are using Social Security numbers but in a manual way by going to actual physical files.

MR. GILDIN: Excuse me, Your Honor. He could just ask the question: Do you object to using her Social Security number if it's done manually rather than by computer? I think Mr. Roy would understand that.

MR. HIRT: I think I have the right to ask my own questions.

[131] THE COURT: Well, you do, but I'm going to sustain the objection because we don't get hypotheticals with any frequency except where experts are involved, and even then, they are generally no longer used. I don't find them helpful, so I am going to sustain the objection on that basis.

BY MR. HIRT:

Q. Well, Mr. Roy, let me try to do it more simply. The absence of the computer in a system which uses Social Secu-

rity numbers doesn't make the situation any better for you as far as you're concerned from your religious beliefs.

A. Well, I don't know how to answer that.

THE COURT: Wait a minute. There's no question, counsel. Ask him a question.

BY MR. HIRT:

Q. Well, I want to see if I understand your objection. Is it your testimony that you object to the Social Security numbers regardless of whether it's inputted into a computer for eligibility or verification purposes?

A. That's the one element, yes.

Q. Excuse me?

A. That's the one element, yes.

Q. That's the one element?

A. Yes.

Q. But in your prior testimony, you talked about the evils associated with computers.

[132] A. Right. That's another element, and the third element is with the nuclear weapons and the nuclear plants.

THE COURT: Now, I couldn't hear the last.

THE WITNESS: The third element is these things being involved with the nuclear weapons and the nuclear plants. It's these three elements together that make a great evil, and we object to all three of these elements.

BY MR. HIRT:

Q. Well, let me ask you one more question on this, and then we'll try to sum up.

If the computer system that's used by Lycoming County were set up to input the names and it communicated with other systems with names, not Social Security numbers, would you still object to that process for your religious beliefs?

A. Not as far as Little Bird's name because that's why she was given that name.

Q. So, the computer itself is not the greater part of the evil that you're concerned about; it's part of the evil but not the greater part?

A. I consider them, all three, to be evil. It's just that they combine to make the great evil that's foretold in one of our legends.

Q. Do you have any estimate as to when Little Bird of the Snow will be old enough to decide whether she should have a number?

[133] A. She's going to have to decide that.

Q. Well, do you have any idea about when you're going to raise the issue with her?

A. Well, I would imagine she'll come to her own understanding about this.

Q. Well, do you plan on waiting, for instance, until she needs to go out and look for a job herself?

A. That will be her decision.

Q. One final question I want to ask you about is the photography. I think you testified that it was contrary to your religious beliefs to have photographs taken of yourself; is that right?

A. Right.

Q. But your wife has had photos taken of your children; is that right?

A. As far as Renee, yes; as far as Little Bird, I only know of two.

Q. You know of two photographs of Little Bird?

A. Right. Both were taken without our permission.

Q. Did those freeze her spirit?

A. Yes. As I believe, yes.

Q. How serious is it that the photographs were taken without your consent?

A. It's not that serious in that there is—there could probably be a power invoked to guard against that or to [134] gain that part of the spirit back. I don't know. It's serious enough that we try to avoid it.

Q. Even though on the one occasion it was your wife who took the picture?

A. No, my wife didn't take the picture. It was an in-law who took the picture behind our back when we were not around after we had specifically asked them not to.

Q. By in-laws, you mean someone in Karen Miller's family?

A. No. My brother's wife.

Q. Your brother's wife.

A. And we haven't spoken to them since.

Q. So, it's your testimony that your wife didn't consent to have the picture taken; is that right?

A. No.

Q. It's your testimony that your wife, Karen Miller, did allow the picture to be taken?

A. She did allow the picture to be taken?

Q. My question is: Did she or did she not?

A. As far as I know, she did not.

Q. Did not. Do you recall testifying on this issue at the administrative hearing?

A. As far as myself, yes.

Q. Do you recall the question: "On that one occasion, you did permit her picture to be taken?"

[135] Answer: "Her mother did."

What does that mean?

A. Well, that was the other occasion. There were two occasions, like I said, when her picture was taken and both without permission. One was when she was out here at Brandon Park, and they put it in the local paper, and they had quick taken her picture; but the person who took the paper—took that picture didn't ask. They just took the picture, and then they asked her for the name.

Q. But except for this Brandon Park incident, the incident you referred to in your other testimony was where your wife, Karen Miller, allowed the picture to be taken.

A. Well, that's what I meant by that at that time. She really didn't allow it because the picture was taken before she knew it.

Q. But of course, the answer that goes on says: "You see, part of our relationship is we both have an equal say in these matters, so I respected her wish on the one occasion, and on the others, she respected mine."

By "her," you meant Karen Miller; isn't that right?

A. Right.

MR. HIRT: I have no further questions.

THE COURT: Mr. Ressler, any questions:

MR. RESSLER: Yes, Your Honor, just a few. Is it acceptable to the Court if I ask them sitting down?

[136] THE COURT: Well, it makes no difference to me.

CROSS EXAMINATION

BY MR. RESSLER:

Q. Mr. Hirt asked you if you would be upset if you found out that the welfare department already had a separate number for Little Bird of the Snow; and if I remember correctly, your answer was that you would be a little. Is that correct?

A. Well, yes, I might be. I don't know. I haven't really considered that.

Q. Now, let me ask you this: If it turned out that was the case, would Little Bird of the Snow have lost her power, have lost her opportunity to gain power?

A. If they've used a Social Security number?

Q. No, another number, but a number that was unique to her.

A. It would depend on how widely used this number is and, you know, whether it represents the evil that this number does, the Social Security number does. Otherwise, I don't know really how to answer that.

Q. If Little Bird has a unique number that is used by the welfare department—

A. For her alone?

Q. Yes.—would you object to that?

A. It would depend on how widely that's used. If it's [137] used specifically to identify her the way the Social Security number is and as widely as it is, it would represent the evil.

Q. How widely do you think the Social Security number is used?

A. I don't know. You all sent me a big, thick package showing me just how widely it is used, and that kind of showed me what I was fearing would happen did happen through the use of this number.

Q. Well, then your objection is not necessarily to the uniqueness of the number but to—

A. That's one element of it. That's the main element in that it's unique to the person, and then, again, it's used that widely, it becomes an evil.

Q. If the welfare department already had a number for Little Bird and it was used within the department, would

you still object to her also having to get a Social Security number?

MR. GILDIN: I object, Your Honor. I think this has been asked and answered twice before.

MR. RESSLER: Your Honor, I believe it is very relevant on the question of what alternatives Mr. Roy is willing to accept. He has testified that he's willing to accept alternatives, but we have not heard any alternative that is acceptable to him; and I'm just trying to find out if this would be acceptable.

THE COURT: But is this repetitive? Has he [138] answered it? Do you think he has answered this before?

MR. RESSLER: I still do not know his answer.

THE COURT: All you've got to do is say yes or no to me.

MR. RESSLER: No, I don't think he's answered this.

THE COURT: Fine. I'm going to overrule the objection. Now, read the question back, please.

(The pending question was read back by the reporter.)

THE WITNESS: Would I also object to her having to get a Social Security number? Yes.

BY MR. RESSLER:

Q. You testified that it will be the decision of Little Bird to make as to when she should decide if she wants to get a Social Security number; is that correct?

A. Right.

Q. Do you plan to ever discuss this with her?

A. I probably will when she gets older. I don't know. I'm not there yet.

Q. How old do you think she'll have to be before you make that decision, before you have that conversation?

A. I don't know. I made no plans, if that's what you're asking me. I made no plans of that. I don't know.

Q. Is it fair to assume that you have never discussed this with her at her current age?

[139] A. No.

Q. Have you ever talked with your wife about when you will discuss this question with Little Bird?

A. Yes.

Q. What was the substance of that conversation?

A. Well, she agreed with me as to Little Bird having to make her own decision on that and having her own mind on that.

Q. Does your wife have an opinion on how old Little Bird should be?

A. I don't know.

Q. Did you ever ask your wife that?

A. How old she should be before she would have a Social Security number or ...?

Q. No, before she should make the decision on whether to get one.

A. Well, our conversation didn't get around to how old she should be. It was just more or less left at: This would be her own decision; this would be Little Bird's decision to make.

Q. Is it fair to assume that you will advise Little Bird not to get a Social Security number.

A. Well, I would point out to why I would object to it and to why others would object to it, and then I would point out to why she needs it; and she would be left on her own to make that decision for herself. I would not sit there and say [140] that she had to decide one way or the other. I would not try to encourage her one way or the other.

Q. Your daughter was born on December 26, 1980, Little Bird was born on December 26, 1980.

A. Correct.

Q. When she was born, do you have any idea if she was issued a birth certificate?

A. Yes, she was.

Q. Have you ever seen the birth certificate?

A. Yes, I have.

Q. Would you happen to know if there's a number on that birth certificate?

A. Yes, I think there was.

Q. Did you object to the issuance of the birth certificate to your daughter?

A. Yes, I did, but on different grounds than this.

Q. What was your ground there?

A. Well, that they had automatically listed her race as white, and I contacted the people at Vital Statistics that her race was not white, her color was white.

Q. Was that your only objection?

A. And that her race was Indian, Abenaki.

Q. I'm sorry, I didn't mean to interrupt your answer. Was that your only objection?

A. As far as I considered it, yes.

[141] Q. You testified that you became aware of your beliefs through books and legends and--

A. —and oral traditions being expressed to me and through some of my own intuition.

Q. Do you think you can separate Abenaki beliefs from that of other tribal beliefs?

A. Some are similar and some are completely different. It would depend on that.

Q. How about sitting on top of the mountaintops; is that unique to Abenakis?

A. No.

Q. How about going to Minnesota and getting this pipestone; is that unique to Abenakis?

A. No.

Q. How about purifying yourself; is that unique to Abenakis?

A. No.

Q. What things have you testified to that you've done that are unique to Abenakis?

A. As far as how we look at the creator. In our specific instance, that is Abenaki. As far as how I wear my hair, because there's several other tribes that wear braids or they wear the knot or they wear their hair in a different fashion. As far as I know and as far as I've been told, the Abenakis are the only ones that wear their hair long and loose. [142] That is our custom.

Q. Do the Abenakis have a rule about shaving facial hair?

A. No.

Q. Did you discover the Abenaki belief on hair from seeing pictures of Abenakis or from meeting with them?

A. Well, I've worn my hair a long time long and loose, and I believe that it made my spirit stronger, and in that way, my belief was Abenaki. It was after I heard the chief speak on this in 1990 that confirmed that I was indeed following Abenaki tradition at that point.

Q. So, isn't it true that you wore your hair long before you found out that that was a tenet of the Abenaki belief?

A. I held the belief, but I didn't know it was just specific to Abenakis.

Q. Do Abenakis think that government is good or evil?

A. Well, that would depend on who you spoke to. Some of the traditionals would automatically believe that the government was evil, and some of those who have participated in the system, they would believe that it's good and evil.

Q. Are you a traditionalist, or are you a more modern person?

A. Well, I've been forced to be more modern.

Q. Who has forced you?

[143] A. By my circumstance at birth. I was born in Concord, New Hampshire. I wasn't born at Odanak.

Q. Have you ever thought of moving there?

A. I have, yes, but I haven't had enough money to move there, so it kind of negated that.

Q. Well, if you were to win this suit and get your $1,500.00 in back welfare benefits, would you take that money and move to the reservation?

A. No. I might visit, but I wouldn't move back.

Q. Are you opposed to all forms of nuclear energy?

A. It ain't so much the forms of nuclear energy as what they're using them for to make, and that is an represents one of the elements of Katahdin.

Q. I understand Katahdin to be a mountain in Maine. Is that the same Katahdin you're talking about?

A. It's spelled the same way, but the legend is among the tribes. It doesn't relate to the mountain itself, the legend, but it's spelled the same way.

Q. Is it your understanding that this is an ancient legend?

A. Yes.

Q. When we say "ancient," beyond when the white man came?

A. Yes.

Q. Of course, there wasn't nuclear power before the [144] white man came; right?

A. No, but they had their prophets.

Q. So, the legend is concerned with prophets?

A. Well, it's a prophecy that they believed that you create something you cannot control.

Q. How did you discover that the Katahdin legend specifically dealt with nuclear energy?

A. I didn't. That is using my own intuition, and I see that we have something that we can't control here.

MR. RESSLER: I have no further questions.

THE COURT: Ms. Allaben, do you have questions?

MS. ALLABEN: I have no questions, Your Honor.

THE COURT: Any redirect?

MR. GILDIN: Your Honor, we have no redirect examination. One point of clarification, I believe, if I understand Your Honor's order, do we move for the admission of these exhibits that were identified through Mr. Roy at the close of his testimony or of our case?

THE COURT: But we're not through yet necessarily because Mr. Hirt has an opportunity to ask—if you don't have any redirect, he does have an opportunity to ask on recross.

MR. GILDIN: I have no redirect.

THE COURT: Do you have any recross, Mr. Hirt?

MR. HIRT: Well, Your Honor, I have one question.

THE COURT: It must be related to something new [145] raised by Mr. Ressler. Does it?

MR. HIRT: That was just what I was going to check. I have one question, Your Honor. Well, I don't want to say just one because I've often proven myself wrong when I say that.

RECROSS EXAMINATION

BY MR. HIRT:

Q. Mr. Roy, in terms of what you've talked about, the views of the government, do you find the type of regulations that the welfare department imposes upon your family to be objectionable, apart from the Social Security number?

A. I find one, yes.

Q. Excuse me?

A. One, yes.

Q. One, yes, what?

A. Where I participated in the thing where they had you sign statements, where they coerced you into signing these

statements or they would withdraw your grant; and I told them that under those circumstances, it did offend us.

We were forced to sign a paper because we did it one time; and a chief in one of our tribes by the name of Greyhawk said that he would not touch the paper.

Q. What type of paper is this, if I can clarify?

A. He wouldn't touch anything paper.

Q. I understood you to be talking about that the [146] government, meaning the Pennsylvania Welfare Department, wanted you to sign a particular piece of paper that you objected to.

A. Right.

Q. What was that type of piece of paper?

A. It was an income reporting form, I think it is. It's a monthly report.

Q. Monthly reporting form?

A. Yes, but I did sign it, but I did put under every one I signed that I signed it under protest underneath my name.

Q. Is it fair to say that you found that sort of effort by the government intrusive upon you?

A. Well, I found it very distasteful that they would use that manner of coercing you to do it, that they would force that on me.

Q. Well, they really weren't forcing it on you, though; were they?

A. Yes.

Q. I mean, you were free not to sign it; right?

A. I could not sign it, and then we would have nothing.

Q. You would have no government benefits is what you mean.

A. We would have nothing at all. I'd have no food to feed my children, and under those circumstances, I consider it to be forcing it on me.

[147] MR. HIRT: No further questions.

THE COURT: All right. I have one question. Would the use of the name Little Bird of the Snow followed by her birthdate be offensive to you?

THE WITNESS: I don't see where that would be, no, because again you'd be using her name, and that's the specific reason we gave her that name.

THE COURT: All right. Any questions related to the Court's question, Mr. Gildin?

MR. GILDIN: Your Honor, we still have no questions.

THE COURT: All right. Mr. Hirt?

MR. HIRT: If I could have a second to pause and think about it.

THE COURT: Before you ask your question, pass me back up that note with the number on it, will you please?

(The law clerk complies.)

THE COURT: This is no trick, but there is a system of remembering numbers by sound. In other words, you can remember a 16-digit number by various sounds and pictures; and it's a well-known system. Have you ever heard of anything like that?

THE WITNESS: As far as the telephone system, I guess, yes.

THE COURT: Yes. For instance, this is somewhat humorous, I suppose; but the number I dial for the Chief Judge [148] in Scranton is "Phillippino Ovenpot." Now, that's very easy for me to remember, and that's a tremendous, long number; and this is a well-known system.

Now, what I'm going to put to you is: If you translated Little Bird of the Snow by that system, it would result in 515-941-8102; and thousands of people in the United States, if they saw that number, would realize that that says "Little Bird of the Snow."

Now, would that be offensive to you?

THE WITNESS: No. Because, like I said, she had been given that name to protect herself, and however it's used and sounds, she would have that power to invoke to protect herself from any evil.

THE COURT: Now do you have any questions related to the Court's questions, Mr. Gildin?

MR. GILDIN: Still no questions, Your Honor.

THE COURT: Mr. Hirt?

MR. HIRT: Yes, I have a question.

RECROSS EXAMINATION

BY MR. HIRT:

Q. Is it your testimony, then, Mr. Roy, that if the government converted your daughter's name into a number and

then put that number into a computer that you would have no objections to that from your so-called religious beliefs?

[149] A. To that, yes.

Q. To that, yes?

A. As far as the sound, no; but as far as converting her name to a number, yes.

Q. So, converting her name to a number is offensive?

A. Yes, and that would depend again on how widely that would be used.

Q. Okay.

A. Because if it represented a great an evil as the Social Security number, we would have to say: Yes, that would be very offensive.

Q. So, if the government said to you, "We will convert your name into a number, and we will cross-match it," if I can use that term, "against all of our other data banks," the same universe of exchanges with the Social Security number, you would find that just as offensive as the Social Security number.

A. If it was used in a similar manner, yes.

Q. Okay. In terms of use, can you define for us how narrow a use you would find acceptable?

A. What do you mean, "how narrow a use"?

Q. How narrow. In other words, if the State of Pennsylvania said, "We will convert your daughter's name into a number and we will promise you that we will use it only for two purposes," and let's say it's to control her files in the sense of knowing that it's her file and that they will exchange it [150] with one other data base.

A. I don't know.

THE COURT: I don't think you finished your question.

MR. HIRT: I didn't finish my question.

BY MR. HIRT:

Q. Would you find that offensive, if they said, "We're going to make two uses of it"?

A. Of what her number—her name converted to a number?

Q. Yes. In a computer now, don't forget, there would be a computer.

A. I don't know.

Q. You don't know.

A. I don't really understand what you're saying with that.

Q. Well, I think your objection, as I understand it, is that the wideness of the use of this unique number compounds the evil. I don't want to put words in your mouth, but if I understand you, are you saying that if the government said, "We are only going to make, let's say, two or three uses," that that would lower your concern? Would it lower your concern?

A. Somewhat, yes.

Q. But it wouldn't eliminate it, I assume.

A. No.

[151] MR. HIRT: I have no further questions.

THE COURT: All right, Ms. Allaben, do you have any questions?

MS. ALLABEN: No questions, Your Honor.

THE COURT: Thank you. You may step down.

MR. GILDIN: Excuse me, Your Honor, with one formality. This time we've figured something after an hour and a quarter of listening to this, and that's just one question, if I may be permitted.

REDIRECT EXAMINATION

BY MR. GILDIN:

Q. Mr. Roy, we're hearing about all of these possibilities and alternatives. Did anyone that you dealt with from the welfare department tell you anything other than, "We must have a Social Security number or no benefits"?

A. Did they tell me anything other than that?

Q. Right.

A. No. They didn't tell me any other thing except that we had to have—we had to apply for the Social Security number for her or they would discontinue the benefits.

MR. GILDIN: At this time, Your Honor, we would offer into evidence Plaintiffs' Exhibits One, Two and Three.

THE COURT: One, Two and Three. Any objections to any of those three exhibits?

[152] MR. RESSLER: None, Your Honor.

THE COURT: All right. We'll admit all of them. Now, we have been in here approximately an hour and 15 minutes. I

think it would be appropriate to take a recess at this time. We'll take ten minutes.

(Recess taken from 3:07 to 3:17 p.m.)

THE COURT: Do you wish to call another witness, sir?

MR. MILES: The plaintiffs call Professor Drinnon.

(Witness sworn.)

THE WITNESS: I so affirm, Your Honor.

RICHARD DRINNON,

having been called as a witness on behalf of the plaintiffs, being first duly sworn according to law, testified as follows:

EXAMINATION

BY THE COURT:

Q. Do you spell your last name D-r-i-n-n-o-n?

A. No, sir.

Q. All right. Spell it for me.

A. D-r-i-n-n-o-n, Drinnon.

Q. D-r-i-n-n-o-n, Your first name?

A. Richard.

Q. Do you use a middle initial?

[153] A. I do not, sir.

Q. Where do you live?

A. Milton, Pennsylvania.

Q. What's your occupation?

A. I'm a professor of history at Bucknell University.

Q. Do you have a doctorate?

A. I have a PhD from the University of Minnesota, 1957.

Q. Now, where did you get your baccalaureate degree and your magisterial degree and when?

A. My baccalaureate from Willamette University, 1950, summa cum laude; 1951, a Master of Arts in history at the University of Minnesota; and then, the PhD in '57, which was in American studies.

THE COURT: You may go ahead, Mr. Miles.

DIRECT EXAMINATION

BY MR. MILES:

Q. Professor Drinnon, you mentioned that you're teaching at Bucknell University. How long have you taught there?

A. Since 1966.

Q. Have you held any positions other than professor?

A. Between 1966 and 1974, I chaired the Department of History.

Q. Prior to 1966, did you hold any other teaching [154] positions?

A. I taught at the University of Minnesota as an instructor in humanities in 1952-53, and then in 1955—no, 1956-57, was an instructor in social sciences at the University of Minnesota.

THE COURT: Where is the University of Minnesota; in the St. Paul/Minneapolis area?

THE WITNESS: The twin cities, St. Paul and Minneapolis.

BY MR. MILES:

Q. Have you received any honors, fellowships or grants since receiving your undergraduate degree?

A. Yes. I was a Bruern Fellow—it's a specific British foundation—a Bruern Fellow in American civilization at the University of Leeds in England, 1961-1963.

THE COURT REPORTER: How do you spell that?

THE WITNESS: B-r-u-e-r-n, Bruern Fellow.

THE COURT: I thought she was asking you about the university. It's L-e-e-d-s.

THE WITNESS: That was Leeds, L-e-e-d-s, England, 1961-1963. In 1963-1964, I was a faculty research fellow of the Social Science Research Council.

Leaving aside summer grants and the like, in 1980-1981, I was a senior fellow of the National Endowment for the Humanities.

[155] BY MR. MILES:

Q. Are you the author, coauthor or editor of any published books, essays, reviews or articles?

A. Yes.

Q. Have you written any books, essays, reviews or articles that discuss the traditions and religion of native Americans?

A. Yes. My second book, entitled "White Savage: The Case of John Dunn Hunter," was about a man who had been a captive of the Osage Indians. Thereafter, I edited his memoirs of the captivity with the Indians of North America.

In 1980, a book entitled, "Facing West: The Metaphysics of Indian-Hating and Empire-Building," was published in

hard cover by the University of Minnesota Press and in soft by the New American Library.

Q. Have you written any essays or articles dealing with native Americans, in addition to your books?

A. Yes.

Q. Could you tell the Court about some of those?

A. A number of articles with especially the interface between red/white relations. I've been especially interested in patterns of American racism.

One of the essays, for example, "Winning the West," I delivered at the Goucher College's Henry L. Stimson lecture in 1969. Another article was published some years later, [156] "Imperialism in the Age of Jefferson and Monroe," which was published in the Massachusetts Review. They also published an article, an essay entitled, "Thomas Martin and the Puritan Patriarchs," several years later.

Out of, say, a score and a half, out of 30-some articles and reviews, why in the last—I suppose a third to a half have been on native American topics or on Anglo-American/native American relations.

MR. MILES: Rather than have Professor Drinnon list all of those, Your Honor, I would simply point out to the Court that a list of those are found in his resume, which is attached to the plaintiffs' pre-trial memo as an exhibit.

THE COURT: Well, we're not going to read it. If you want to bring out anything further on it, go ahead and do it.

MR. MILES: Thank you, Your Honor.

THE COURT: I'll tell you how we decide these cases. The day after the evidence ends, we decide the facts, and I don't want to be under a burden to go through something else that hasn't been submitted to me in open court.

BY MR. MILES:

Q. Professor Drinnon, can you recall some of the titles of some of the other articles, so that the Court can be familiar with some of your other writings?

A. Yes. Let me just start out maybe and give you a [157] few titles of some, I think, rather more significant. In 1962, the Massachusetts Review published an essay by me entitled, "Thoreau's Politics of the Upright Man." Thoreau refers to Henry David Thoreau, T-h-o-r-e-a-u. That has been

reprinted a number of times. It's currently in the Norton Critical Anthology on Henry David Thoreau. I mentioned this article because I deal with Thoreau as one of the kind of extraordinary figures who tried to understand native American worlds, who regarded himself to some extent as a white Indian and discussed this in this article that I've just tried to at least identify for you.

As it happens, the Massachusetts Review published a similar article entitled, "Rediscovering 'The Indians.'" That was the subtitle. The title is "American Pastime." The article itself deals with our perennial rediscovery of Columbus' misnomer, "Los Indios," the Indians, as though the Indians were a single block of people which, of course, they weren't; and this is one of the themes that I pursue there.

Q. Are there other articles that you've written about native Americans?

A. Let me just mention another of those.

Q. Let me ask you this, Professor: Have you recorded those articles somewhere else that might help you to recall the titles of those articles?

A. Yes, of course, they're in my C.V., and as you [150] noted on the telephone the other day, there were 24 or thereabouts.

Q. When you say your C.V., do you mean your curriculum vitae?

A. I mean my curriculum vitae.

Q. Would it assist you to have a copy of that curriculum vitae?

A. It would, and I was hesitant about imposing on the Court a long list of all of my trophies; but if you don't mind, I'll just turn to some of these.

Q. Perhaps if you could just give the titles of the ones that deal particularly with native Americans; I realize you've written a substantial number of articles, but those that deal particularly with the subject matter with which we're concerned here today.

A. The one that I mentioned, which was the Henry L. Stimson lecture at Goucher, "Violence in the American Experience." I called it, "Winning the West." It was republished, reprinted in the Radical Teacher, Winter 1970.

Then, an occasional piece entitled, "On the Art of Civilizing Indians: Cut Off Their Hair," that was published in the Indian newspaper, Akwesasne Notes.

Then, "Review of Fathers and Children: Andrew Jackson and the Subjugation of the American Indian," published in the New York Times Book Review, June 15, 1975.

[159] I've already mentioned, perhaps I might as well list, "The Metaphysics of Empire-Building: American Imperialism in the Age of Jefferson and Monroe," published in the Massachusetts Review of Autumn, 1975.

I'll just mention a couple of others. "Ravished Land," which was the title, an essay review of "The Invasion of America," by Francis Jennings. That appeared in the Indian Historian in the Fall of 1976.

A review that was important to me, "Spiritual History," a review of a book entitled, "Beyond Geography," by Frederick Turner. That review appeared in the Nation on March 22, 1980.

Another one that I listed in my attempt at an overview, "The Maypole of Merry Mount: Thomas Morton and the Puritan Patriarchs," that appeared in the Massachusetts Review.

THE COURT: Thomas who?

THE WITNESS: Thomas Morton, M-o-r-t-o-n. I might add, if it's appropriate, that of the six books which I'm either in two cases or three cases author and one case editor and in two cases co-editor with Anne Marie Dvinnon, that two of these books, the most recent ones, deal with native American topics and, of course, Anglo-American; and that I have forthcoming, currently being considered for publication, a volume entitled, "Keeper of Concentration Camps: Dillon S. Myer: an American Literalism," and the Myer is spelled M-y-e-r. This [160] book is addressed to, deals with and analyzes the man who directed the World War II concentration camps for Japanese Americans and then went on to become Harry S. Truman's Commissioner of Indian Affairs in 1952-1953.

BY MR MILES:

Q So, these books and articles you've just described to the Court deal with native American traditions and religion?

A. Yes.

OBJECTION BY MR HIRT: Your Honor, I object. I don't think he's testified that it deals with Native American religion and tradition. I think counsel is leading to a conclusion not voiced during that testimony.

BY THE COURT: What's your view, counsel?

RESPONSE BY MR. MILES: Well, Your Honor, I don't think it was leading at all. I stated at the outset that these were articles that he had written about Native American tradition and religion, and I was simply encapsulating that these were articles, among others that he had written, that deal with that topic.

THE COURT: Well, it seems to me it's clearly leading. So, I'm going to sustain the objection, but you may pursue the inquiry.

BY MR. MILES:

Q. The articles and books that you've just mentioned, Professor Drinnon, do they address a particular area of inquiry?

[161] A. They address the relationships between the dominant culture, Anglo-American culture, and native Americans. I'm a student of native American cultures. That means perforce that I'm a student of native American religion because they make no such separation between culture and religion.

Q. Have you ever lectured about the traditions and religions of native Americans?

A. I have.

Q. Could you tell the Court about some of your more noteworthy lectures dealing with this area, please?

A. I've mentioned one, and that is the Stimson lecture at Goucher College on "Winning the West" in 1969. That and like lectures I delivered during a sabbatical in 1972-73 at various places, including Trinity College in Dublin, Ireland, the Universities of Leeds and Sussex in England.

More recently, I delivered one of the bicentennial lectures at Northern Illinois University in De Kalb in the Spring of 1976. It was entitled, "Merciless Savages and Founding Fathers."

Most recently, just to pick up on some of these—most recently, I delivered the lecture that I've already given you

the title, "Rediscovering 'The Indians,'" at the State University of New York in Buffalo in the Spring of 1992.

Q. As part of your teaching curriculum, do you now or have you ever taught courses dealing with the traditions and [162] religion of native Americans?

A. Since the late 1960's, I've offered seminars on red/white relations, actually starting in, as I recall, 67-68, and have since offered these seminars yearly up until the very recent past. In addition, I've launched a course on the history of the American West, a two-semester course, which I taught last year and am currently finishing up the second year now.

Q. Do those courses deal with the traditions and religion of native Americans?

A. These courses deal with the traditions and cultures. One of the discoveries I made along the way—I hope this isn't repetitive—but one of the discoveries I made along the way was that for me to understand anything about native Americans, I had to understand native Americans cyclicly.

THE COURT: I didn't get the last word.

THE WITNESS: Cyclicly, as cyclical. I had to deal with their spiritual history, otherwise I was remaining on the surface of my phenomena, so I thought.

MR. MILES: Your Honor, at this time the plaintiffs would offer Professor Drinnon as an expert on the traditions and religion of native Americans.

THE COURT: Do you wish to cross examine?

MR. HIRT: Yes, I have brief cross examination.

[163] CROSS EXAMINATION (ON QUALIFICATIONS)

BY MR. HIRT:

Q. Professor Drinnon, is it correct that you have no degrees in theology?

A. It is correct that I have no degrees in theology, nor do I have one in anthropology.

Q. What about religious studies?

A. Religious studies, I do not have a degree in religious studies.

Q. In terms of some of the publications you've noted, for instance, "White Savage: The Case of John Dunn Hunter," in

it fair to say that that book deals with the story of his life; is that the essence of that book?

A. It is not the essence; it is the kind of organizing principle around which the book was written. The book is at least, Mr. Hirt, as much about the reaction to John Dunn Hunter, hence "The Case."

Q. The reaction of the whites to his experience?

A. That's correct, and of the Cherokees and with others with whom he was associated, the Osage, yes.

Q. Would it be fair to say that it was primarily an historical work on your part?

A. No, I don't think fair completely. Fair enough maybe, but not completely fair in the sense that it attempted to be a work in ethnohistory, and that is an attempt to deal [164] with or work with dimensions of native American cultures that most historians don't touch.

Q. Is there any discussion in this book about religious traditions of native Americans?

A. There are passages dealing with the creation myths of the Osage, yes, and the variations on the creation myths of the Osage.

THE COURT: Why do you call it a myth?

THE WITNESS: Your Honor, a myth for those studying ethnohistory isn't synonymous with a legend.

THE COURT: You say "is" or "is not"?

THE WITNESS: Is not, is not synonymous with delusional, is not synonymous with illusion, but is a means of people's ordering, understanding their world, accounting for it in pleasurable ways, ways that are satisfying to them, even though sometimes they deal with very painful topics.

The Judeo-Christian tradition has, of course, a creation myth as well.

THE COURT: All right. Well, I just wondered whether you would call all of those—

THE WITNESS: All I'm doing is pointing out that I don't use the term in a positivistic, social scientific way of referring to a myth as simply equivalent to a fiction.

THE COURT: Equivalent to what?

THE WITNESS: A fiction.

[105] BY MR. HIET:

Q. Now, is it fair to say, Professor Deinnon, that except for a few passages in the book dealing with the Osage cosmology—is that a term?

A. Yes.

Q. —that that is the extent of the discussion of religious tradition in the book; is that correct?

A. That book did not focus on Osage religious traditions. It focused on Osage culture, and that meant that one way or another I had to discover that this culture was suffused with the sacred.

Q. But that discovery is not within the text of the book, is that correct, other than those passages you mentioned?

A. Well, those passages indicate what was of critical importance to the Osage; and at that point, I did not address, of course, the question, and that is: Was there a sharp separation between religion and culture?

Q. Well, apart from that, but the answer essentially is no; is that correct?

MR. MILES: I'm going to object, Your Honor. I think he answered the question.

THE COURT: What's your response, counsel?

MR. HIET: Well, I was trying to get an answer from Professor Deinnon about, except for those passages, were those essentially the only discussions of religion, not in terms [106] of how he got to that point; and I was just trying to elicit the "no," which I thought was his prior testimony.

THE COURT: When you ask the question with a negative in it, it's always very difficult to tell what the answer means; and it's especially difficult on appeal because it's subjective. It's possibly, easily understood to mean two conflicting answers.

So, I'm going to sustain the objection, but only on the grounds that there was a negative in the question; and please ask it without it if you can do so.

MR. HIET: Well, if I may, Your Honor, let me approach the witness and show him the index to the book and point him to the passage.

BY MR. HIET:

Q. Do you have that in front of you, Professor Deinnon?

A. I do.

Q. Now, is it correct to say that, except for the references to cosmology at Pages 76, 77—what's the next page, if you can read it?

A. 76, 77, 107, and 142M.

Q. —that those are the only, to your recollection, references to the Osage cosmology in that book? Yes or no, if you can answer it that way.

A. Yes, with an explanation, if I may. No? Am I out [167] of order?

MR. HIRT: I'm not stopping you, but I did ask for a yes or no.

THE COURT: All right. Well, you may make an explanation if it's a factual explanation which indicates why you cannot answer the question with a yes or no.

THE WITNESS: Your Honor, I appreciate the possibility of explaining in short compass. The answer was yes, cosmology as such; but the whole book is about Osage culture and the reaction of white Americans to it. This culture was simply suffused with religious concerns; and the index is quite correct, that the passages that are pulled out relate to cosmology as such.

BY MR. HIRT:

Q. Is it your testimony that the book is suffused with Osage—

A. That Osage culture was.

Q. But isn't the book essentially, in terms of the written text—and I don't want to oversimplify it—but isn't the essence of this book, in terms of its text, the story of this man and his relationship with people like Mr. Cass, who I guess was a well-known figure in that time period, and the relationships of this man and the society that he faced, which was the white society; isn't that the essence of this book?

A. Would you explain what you mean by "essence," [168] please?

Q. Well, isn't it fair to say that this book, "White Savage: The Case of John Dunn Hunter," is basically your effort to put this person's role at that time period in history, if I can use the term, in contrast with some of the whites, such as Mr. Cass and their contrasting views of society?

A. It surely is that, and in order for me to do that, if I may, why I had to come to some understanding of the Osages, especially given the allegations that Hunter was an imposter.

That meant that for me to look at him within the native American world, specifically the Osage world, I had to come to terms with Osage culture; and I think that's reflected in the book.

Q. Now, let me show you the references to Osage culture in the book. If you could look at those entries and explain that to me.

I'm just asking you to look at the term "Osage culture." Can you read for the Court how many pages we're talking about?

A. Here in the index entry, "Osages, culture of, 73-74, 130-40." So, seven and ten—fourteen pages; but then going on, "materia medica, 75, 128-29, 130; 'sensual' nature of, 75-76, 240," sensual with quotation marks, excuse me. "241-43," and then, "The cosmology of, 76-77, 107, 142N."

Q. Thank you, Professor Drinnon.

[169] A. You're welcome.

Q. You've gone beyond what I asked, but that's all right.

A. May I respond, and that is: That dealing with allegations of the sensual nature of the Osages, there was a discussion of whether or not the Osage culture was "sensual."

Q. Can you recall whether there's any discussion of the religion of native Americans in your—let me see if I can find this—"Violence in the American Experience: Winning the West"?

A. Yes.

Q. This is a 1970 publication.

A. Yes.

MR. HIRT: I have no further questions.

THE COURT: Mr. Ressler, any questions?

MR. RESSLER: No questions?

THE COURT: Ms. Allaben?

MS. ALLABEN: No questions, Your Honor.

THE COURT: All right.

MR. HIRT: Your Honor, I still do want to make an objection, however.

THE COURT: All right. Well, the way to get it in focus is that Mr. Miles is now going to move that the witness be qualified as an expert in a certain field; and then, you can object, and we'll hear what you have to say.

[170] MR. MILES: Your Honor, at this time, I'd renew our plaintiffs' motion that Professor Drinnon be offered as an expert on the traditions and religion of native Americans.

MR. HIRT: Well, briefly stated, Your Honor, my objection is that I don't think that someone who is concededly neither a theologian, religious studies professor or anthropologist and whose summaries of these articles, on their face, do not indicate a great deal of religious content and whose book on Mr. John Dunn Hunter has very few religious references, I don't think that Professor Drinnon qualifies to speak in terms of religous traditions.

He may be able to speak to culture, but I object especially to what I think the thrust of the plaintiffs' case is as to analyzing someone's religious beliefs. I think Professor Drinnon may be a very qualified historian, but I don't think that's the issue here.

MR. RESSLER: Your Honor, Defendant Cohen also opposes Professor Drinnon's qualifications as an expert as proffered for essentially the same reasons as Mr. Hirt. We believe that the voir dire has shown that Professor Drinnon, in his capacity and in his training as a historian and as an ethnohistorian, is qualified to testify as to certain maters; but we do not understand or see any basis for qualification that he might have to speak as to native American religion.

We would note that the professor has testified [171] that his interest lies in the relationships between dominant culture and native Americans. That's talking about an interface of two cultures in a historical sense, I assume, since his training is historical and since the books and articles that are in his C.V. are historical in nature; and in fact, he testified that the seminars he taught and I assume is still teaching are again on the interface between native Americans and whites. These seminars aren't on the customs or religion of native Americans.

We submit that, in view of the qualifications that he would need to be an expert as plaintiff has proffered. So, for that reason, we oppose.

THE COURT: Do you want to say anything, Ms. Allaben?

MS. ALLABEN: I have no comment, Your Honor.

THE COURT: We'll grant the motion.

MR. MILES: Thank you, Your Honor.

BY MR. MILES:

Q. Professor Drinnon, are you appearing here today voluntarily and without compensation?

A. I am.

Q. Have you received any compensation for the services which you have provided in connection with this case?

A. I have not.

Q. Now, Professor, have you observed Stephen Roy [172] testify here today before the Court?

A. I have.

Q. Did you observe Stephen Roy testify at the hearing held on June 16, 1983, before the Pennsylvania Department of Welfare Hearing Examiner?

A. A point of clarification: My response would have to be that I thought it was May 13th. It was June 16th?

Q. Your recollection is better than my own, Professor Drinnon.

Did you observe Stephen Roy testify at the hearing on May 13, 1983, before the Pennsylvania Department of Welfare Hearing Examiner?

A. Yes, I did.

Q. Now, Professor Drinnon, do you have an opinion as to whether Stephen Roy's refusal to obtain a Social Security number for his daughter, Little Bird of the Snow, is based upon a religious belief?

A. I do.

Q. What is that opinion?

MR. HIRT: Your Honor, I want to interpose an objection. If the basis that's proffered is his viewing a witness at a hearing, either this one or the administrative hearing, I don't see how Professor Drinnon is any more qualified to determine that than any other individual, in part because there are issues of credibility.

[173] If plaintiffs want to ask Professor Drinnon: "Are certain things stated by Mr. Roy consistent with what he knows about some organic body of Indian law?" that might be a different issue; but I have trouble in terms of asking this ultimate opinion based upon what seems to be someone's demeanor or credibility.

MR. MILES: Your Honor, I would simply point to Federal Rule of Evidence 703, which specifically provides that an expert may base his opinion on those facts or data perceived by or made known to him at or before the hearing; and the notes go on to specifically talk about evidence and so forth and testimony presented at trial.

Furthermore, Your Honor, as an offer of proof, Professor Drinnon will go on to state that his opinion is also based upon readings and so forth, which he's mentioned earlier.

THE COURT: Well, it seems to me that the question asks him what is a matter really for me to decide, for this Court to decide. It's conceivable that I misunderstood. I'll ask that it be read back.

(The prior two questions and intervening answer were read back by the reporter.)

THE COURT: I'll sustain the objection, but you may get at the problem in a different way if you wish.

BY MR. MILES:

Q. Professor Drinnon, is Stephen Roy's refusal to [174] obtain a Social Security number for Little Bird of the Snow consistent with the fundamental principles of native American tradition?

A. Yes, as I understand them.

MR. HIRT: Your Honor, I'm going to object. I don't think there's been any foundation laid for what this so-called tradition is, unless it's what Mr. Roy has testified to, which I don't think is even that tradition. So, again, I question now the lack of foundation to answer that question.

THE COURT: The objection should come in before the answer and didn't in this case, and I'm going to overrule it.

BY MR. MILES:

Q. Would you explain why it is consistent with fundamental principles of native American tradition?

A. I think there is a general agreement among those attempting to understand native Americans that there can be no sharp separation between culture and the other components of that culture. Did I say culture? I mean religion.

THE COURT: Yes, I couldn't understand.

THE WITNESS: I beg your pardon. I hear it sort of echoing. That there could be no sharp division made between the components of culture, such as the religious, the aesthetic, the intellectual, the moral, the social, the political, the economic; that there is, it seems to me, in an answer I heard [175] down in Harrisburg last May and I heard in this court room today, a refusal on the part of the plaintiff to separate: No, I can't divide those out. Religion is what we live by.

That is so consistent, I would argue, with what we have discovered and at long last about native Americans; that that is a diametrically different way of looking at the world and at man's place in it, of humankind's place in it, perhaps I should have said. Hence, on the basis of my own reading but especially confirmed by what I've heard from Mr. Roy, whom I hadn't met before last May 12th, this confirms my own conviction that his response is, in the profoundest sense religious, as we would use the term.

BY MR. MILES:

Q. Is there a generally accepted religious text, such as the Bible is for Christians, for native Americans?

A. In North America, no.

Q. And why is that?

A. The indigenous people here, the tribal peoples here, lived in oral cultures. They had no print culture. Hence, north of the Rio Grande, no such text, no such single treatise, no Bible, no Koran or the like.

Q. Is there a generally recognized treatise or publication on native Americans which defines their beliefs?

A. None that defines. There are a number of monographs on, but none that define, in part because this definition [176] would have to come, until very recently, from the outside.

There are a number of books—and I've tried to provide you with excerpts from some of these books that I have

found useful in the past—that attempt to—what?—advance the highest state of the art of knowing, of learning about native American traditions. There are surely those, and there are others aside from the ones that I provided you with.

Q. You mentioned that you provided me some writings; and I show you now what's been marked sequentially as Plaintiffs' Exhibits Four through Nine and ask you if you would identify those, please.

A. The first is Plaintiffs' Exhibit No. 4, say 20 pages of excerpts from the "Land of the Spotted Eagle" by Luther Standing Bear. The second, another ten or fifteen pages, however many, from—

Q. Excuse me, Professor, I don't mean to interrupt, but I think for the purpose of the record, in accordance with court rules, they have been numbered sequentially. Perhaps you could indicate that. It would help the record and the court.

A. Excuse me.

Q. Thank you.

A. Certainly. If I may back up to the "Land of the Spotted Eagle," I see the pagination here, 15 pages of excerpts from the work, "Land of the Spotted Eagle" by Luther Standing [177] Bear, who is a Lakota Sioux.

The second was Plaintiffs' Exhibit No. 5, twelve pages of excerpts from "Primitive Man as Philosopher," by Paul Radin.

The third, Plaintiffs' Exhibit No. 6, eight pages of excerpts from "The Spiritual Legacy of the American Indian," by Joseph Epes Brown.

Plaintiffs' Exhibit No. 7, four pages of excerpts from "Native American Testimony, An Anthology of Indian and White Relations," edited by Peter Nabokov.

Plaintiffs' Exhibit No. 8 is an essay entitled, "Doing Your Thinking," by Thomas Buckley. It appeared in a journal entitled, "Parabola."

And Plaintiffs' Exhibit No. 9 is a copy of—consists of three pages of excerpts from an article by Gordon M. Fay, "The Western Abenaki."

THE COURT: My copy is cut off at the top, so read this, and I'll try to put it down.

THE WITNESS: Glad to do. I'm doing this from memory, I hope correctly. Gordon M. Fay, "Western Abenaki," and William C. Sturtevant, ed., the Smithsonian Institution, 1978. I'm sorry, did I give you: The Handbook of North American Indians, Volume XV, Northeast, and it's Washington, Smithsonian Institution, 1978; and those are Plaintiffs' Exhibits Four through Nine.

[178] BY MR. MILES:

Q. Now, Professor Dries..., are these writings upon which students of native American tradition generally rely?

A. They are. They are writings, as well, that I found useful in my seminars. They are writings that I have chosen in part because they're recognized by ethnohistorians, anthropologists, native Americans, others, as people who have been contributing to our understanding of native American traditions.

I might add—I didn't earlier—that I could have provided you last spring with many more pages of photocopies of other works; for example, from "God is Red," by Vine DeLoria, Jr., who is a Standing Rock Sioux. This book is recognized by philosophers, theologians, ethnohistorians and others as a major contribution to the understanding of native American traditions from within that world. A more recent work—

MR. HIRT: Your Honor, I don't wish to interrupt the witness, but I think that when witnesses go far beyond the scope of the question, I think it's appropriate to insert and interject an objection that the witness has gone way beyond the answer, and I interpose an objection.

MR. MILES: Your Honor, I don't think it's Mr. Hirt's place to object to the answer of a witness, other than on cross, as far as being responsive. The professor is [179] referring to other works that deal with native American tradition, and I have no objection to that answer.

THE COURT: All right, but your question to him was: What are Plaintiffs' Exhibits Four through Nine? I think you ought to stick with that, so I'm going to sustain the objection.

BY MR. MILES:

Q. Professor Drinnon, the writings you've just mentioned, are these writings that you rely upon and assisted you in formulating your opinions about Stephen Roy's beliefs?

A. They are.

Q. Are there other writings that you relied upon in forming your opinion about Mr. Roy's beliefs?

A. Yes. A work entitled, "God is Red," by Vine DeLoria, Jr., published in 1973; another major work by Jamake Highwater. The first name is spelled J-a-m-a-k-e. The surname Highwater, all one name, a surname. The book is entitled, "The Primal Mind," published in 1981.

Two other titles only: "Black Elk Speaks," as Oglala Sioux holyman. This book was written in collaboration with the poet, John G. Neihardt. And another book that's been important for me in my classes, "Lame Deer: Seeker of Visions."

THE COURT: I didn't get the last word.

THE WITNESS: The subtitle, Your Honor, is "Seeker of Visions." He was also a Sioux holyman, published in the [180] mid-1970's.

BY MR. MILES:

Q. Anything else, Professor?

A. That should be sufficient.

Q. Now, we've been using the term "native Americans" throughout these proceedings. Could you explain exactly who are native Americans?

A. They were the peoples who were here at the time of the arrival of the first Europeans. By modern estimates, 2,000 cultures and even more societies, an enormous variety of values, systems--

THE COURT: What Europeans do you mean?

THE WITNESS: I mean the European colonizers, Your Honor, from 1492 when Columbus was in the Caribbean on through to the Susan Constant and the Mayflower, up in Stephen Roy's part of the world.

THE COURT: I thought you were referring to the Irish claim or claim that Irishmen came over here and also that Northmen came over.

THE WITNESS: Or the Welsh or Lief Erikson. What I'm saying, Your Honor, would apply if we were to move back to the so-called date of discovery, 500 years to Lief Erikson on the northeast coast of North America.

These were the people who were here—maybe I can be more responsive. These were the people who were here with [101] all of these different cultures and societies and with many, many mutually unintelligible languages and dialects within those languages and their descendants, if you ask who they are.

BY MR. MILES:

Q. Now, the first point of the undisputed points is that Stephen Roy is a native Abenaki. Are the Abenakis included among native Americans?

A. To my knowledge, universally so considered. So considered, for example, in one of the sources we've identified, namely, the Smithsonian Handbook on North American Indians.

Therein, a man named Dean R. Snow writes on the Eastern Abenaki; and a man named Gordon M. Day—I provided you with some material from his—a few pages from his contribution to the handbook on the Western Abenakis. They are considered, universally so considered by anthropologists, to my knowledge, historians and others; and of course, so considered by themselves. That isn't inconsequential.

Q. Now, Professor Dricmon, you mentioned the Smithsonian article, which I believe is Plaintiffs' Exhibit No. 9. I would invite you, whenever you're testifying, to read any portion from those exhibits, if you wish to do so.

Now, you've testified that, in your opinion, Stephen Roy's decision not to obtain a Social Security number for Little Bird is based upon a religious belief. I think it would be of great assistance to the Court if you could explain: [102] Is religion a separate part of life to native Americans?

MR. HIRT: Your Honor, before the witness starts, I want to just object. I think it would be fairer for Professor Driscoll to be asked questions about the Abenaki tribe because there has been no showing that there's a universality of tradition or belief or religion among the tribes that have been mentioned.

All that's been established is that the Abenaki are native Americans; but Professor Day[illegible] has said that when the white man came that there were mutually unintelligible dialects among these tribes.

MR. MILES: Your Honor, Stephen Roy testified on direct that he considers himself to be a native American. It's established, in fact, undisputed here that he's a native American. Professor Day[illegible] has explained that the Abenaki are included among the native Americans.

The question that is now standing is to bring out the exact point that we're trying to make here, that you cannot separate these things as simply as we do among Catholics, Protestants and Presbyterians, as Mr. Hirt would like to do; and I think if the witness would be permitted to respond, he'll do exactly that.

THE COURT: It would be helpful to me to find out if there is anything peculiar to the Abenaki as far as religion is concerned. If there isn't, then we'll have to go to the [180] broader areas. So, I'll sustain the objection at this time; but if you can't bring out what you need to bring out, then we'll consider that.

BY MR. MILES:

Q. Perhaps it would be helpful if you would explain the relationship between the Abenaki and the native Americans.

A. There are, as is well known, numerous ways of categorizing native Americans; by language groups, by culture areas. The Abenaki, for example, come from the very northern part of the eastern woodlands culture area, but some of them actually right on the edge of the eastern subarctic subdivision. Then, the other subdivisions; the southwest, the Pacific northwest culture areas.

They are also categorized by language families, such as the Algonquian, the Muskogee and the Siouan; for example, the Osages or the Dghwia. That's D-g-h-w-i-a, as I recall. The Abenaki are Algonquian speaking people like their cousins to the southwest, the Narragansetts.

THE COURT: What did you say? Did you say "Algonquin"?

THE WITNESS: Algonquian speaking people. I'm not sure, but I think this might help. Roger Williams in an in-

portant work, "A Key into Language; or a Help to the Language of the Natives of America." It was published in London in 1643.

Roger Williams, after his banishment from the [164] Massachusetts Bay Colony, he lived there with the Narragansets and became most interested in their language, most interested in their religion, and he discovered that they had at least 37 different gods they all called "manitou," as he spelled it, m-a-n-i-t-o-o. As we spell it today, it's spelled usually m-a-n-i-t-o.

He discovered that they referred to any sign of excellence in a person—valor, wisdom, strength, activity—as a manitou: god. Roger Williams, being concerned as a monotheist, wondered about their willingness to call almost everything, fish, birds, things; manitou. When someone showed excellence of spirit, "Come, manitou." You were a god. So, there were almost as many, and it was very clear—it's very clear now that Roger Williams, in his attempt to find out whether they were monotheists or were they polytheists, that he was dealing with and discovering that everything was a god if it showed any sign of excellence; and what Roger Williams was missing—and I think has been missed by us collectively right on down through to the passage of the Indian Religious Freedom Act of 1978—and that is that all of these things were signs of spiritual power.

In short—if I may just explain what I mean—the culture gap has been so great, the gap has been so great because these are inherently different ways of viewing the world and of humankind's position in the world, wherein for [165] those who saw spiritual manifestations everywhere, such as the Narragansets—as I just cited, Roger Williams finding 37 manitous, 37 gods—all of these were manifestations of the spiritual power that among the Algonquian speaking people, like the Narragansets or like their neighbors to the north, the Abenaki, the Micmacs and others farther north, all of them were, one way or another, celebrating this manitou as a force of creation within all of the world. All of creation was, in that sense, sacred.

Hence, for us to get our heads around to the fact that for them, for somebody very specifically named Mr. Roy, not to be able to make a separation between religion and culture doesn't indicate a failure of mind but it indicates a deeply set way of viewing the world and of being in the world. Not the

sharp separation that we've all grown up with between church and state, no sharp separation between subject and object, return to the religious so-called theme, no sharp separation between the sacred world and the profane world.

In this context, what I'm saying is that it takes an effort of the imagination for us to take seriously and to treat with respect a very, very different way of viewing what is sacred and what is important to them. What I'm saying is that for the aboriginal believer, the world is one to be affirmed, it's inclusive and not exclusive. It is a mind that accepts and doesn't reject, a mind that affirms and doesn't [106] negate.

Hence, the constant attempt to interrelate the mysterious interrelatedness of all things is a theme that you hear from Algonquian speaking people to Siouan speaking people to others farther west. It is this kind of cultural gap that I think one has to attempt to jump in order to understand the kind of view that Stephen Roy brings to this court room and to the case.

BY MR. MILES:

Q. You mentioned interrelatedness. Are the Abenaki beliefs and traditions separate and distinct from those of native Americans; is there a sharp distinction?

A. From those of native Americans? No sharp distinction. Perhaps you meant other native American tribal peoples. No sharp distinction, but the feat is to try to understand the unity within diversity. I very deliberately talked about 2,000 cultures, I very deliberately talked about mutually unintelligible languages; but then one has to talk about certain primal elements that underly them all.

For this purpose, perhaps I might simply refer to Plaintiffs' Exhibit No. 6 and call to the special attention of the Court the work by Joseph Epes Brown, "The Spiritual Legacy of the American Indian"; and if this is appropriate, I'd like to simply highlight some passages here. I'm reading from—

MR. HIRT: Your Honor, I don't wish to object again, [107] but now we have a witness who's reading from an exhibit that hasn't been formally offered. We may have an objection to the receipt of this exhibit. So, I object to this.

THE COURT: Do you have an objection to this exhibit?

MR. HIRT: Well, Your Honor, I don't know what he's going to read from, I agree, but I think that my objection at this point would be that the only exhibit that's been proffered that deals with the Abenakis is that by Mr. Fay, and I don't believe there's been a foundation for the admission of these others at this point in terms of beliefs that are not Abenaki; and I don't believe that anything in this exhibit that the witness would like to speak from even addresses the Abenaki.

MR. MILES: Your Honor, what we're trying to do here—and I'll address Mr. Hirt's objection more directly—what we're asking here, and it's a difficult problem from our perspective in that there isn't the sharp distinction that Mr. Hirt keeps referring to. Professor Dennen keeps explaining that such a distinction doesn't exist, and he's drawing from Exhibit Six to bolster that.

By way of a more direct response to Mr. Hirt's objection, I would refer the Court to Rule 803(18), which provides that an expert witness may rely upon direct examination statements contained in published treatises, periodicals or pamphlets which are established as a reliable authority.

[158] I've already asked Professor Dennen if these exhibits were relied upon by students of native Americans, as—

THE COURT: I didn't hear you. I didn't catch that. Did you ask him that?

MR. MILES: Yes, Your Honor, I did, as part of my foundation earlier on, after I offered them. I asked him: Are these writings that are relied upon by students of native American tradition and religion? His answer was in the affirmative.

THE COURT: I'm going to sustain the objection. By the way, Mr. Rossler, you should get up and make your objection at the same time, immediately after Mr. Hirt, so we get one answer.

This rule of evidence says: To the extent called to the attention of an expert witness upon cross examination or relied upon by him in direct examination ... It doesn't say anything about being relied upon generally. So, if you want to

qualify it under Rule 803(18), I think you should have the opportunity to do that. I'll sustain the objection at this point.

BY MR. MILES:

Q. Professor Driesen, are there any writings which you might rely upon in expounding upon your explanation here?

A. There are. Among them, a work by Joseph Epes Brown [189] entitled, "The Spiritual Legacy of the American Indian," and if it's appropriate, I can explain to you why I think this is important in the context of our colloquy now.

Q. Please do.

MR. HIRT: Your Honor, I don't want to interrupt, but I want to make clear that my objection is a relevancy objection. I want to make sure my objection is noted so that you can rule on it.

THE COURT: All right. I'll overrule the objection. It seems to me the witness has testified that he considers this Brown article as a reliable authority; and if so, we will permit him to read whatever portion of it counsel thinks is important that we hear.

MR. MILES: Thank you, Your Honor.

THE WITNESS: These are excerpts, Your Honor, from a book and not from an article by Joseph Epes Brown.

THE COURT: Okay.

THE WITNESS: Brown is a professor of religious studies at the University of Montana; is well recognized among those who study American religion, ethnologists, anthropologists and others; appears at panel discussions, symposiums and the like. One of his books that was of critical importance to me was his study of Black Elk, a study entitled, "The Sacred Pipe," published by Penguin Books. "The Sacred Pipe" relates to the ceremonial, relating to this red pipestone Mr. Roy made a [190] pilgrimage to Minnesota to get.

Let me read them. This is Plaintiffs' Exhibit Six still, from Page 5, the exhibit numbering.

"A second factor contributing to the unity of this book is found in another different approach to the study and understanding of American Indian religions." This is on page small Roman numeral ten in the original pagination for those who are interested.

THE COURT: I'm lost. Where are you reading from?

THE WITNESS: It's Plaintiffs' Exhibit Six, Page No. 5, and I saw—

THE COURT: But what part of it?

THE WITNESS: I'm reading from the first paragraph, Your Honor.

"A second factor contributing to the unity of this book is found in another different approach to the study and understanding of American Indian religions. It has now become abundantly clear that it is a fundamental and universal characteristic of Native American cultures, as indeed of all primal and primitive cultures, that 'religion'—there is no equivalent word for this in any American language ..."

BY MR. MILES:

Q. Pardon me. I think you said "in any American language."

A. It's "American Indian language." For the [191] stenographer's sake and for all of our sakes, let me back up here just a bit.

"It has now become abundantly clear that it is a fundamental and universal characteristic of Native American cultures, as indeed of all primal or primitive cultures, that 'religion'—there is no equivalent word for this in any American Indian language—is not a separate category of activity or experience that is divorced from culture or society. Rather, religion is prevasively present and is in complex interrelationships with all aspects of the peoples' life-ways. The chapters of this book provide examples of the manner in which religious elements are integrated into, and give definition to, specific cultural expressions of the arts and crafts, music, subsistence activities, and social and political organizations. Necessarily each chapter focuses upon specific examples of this integration of religion, or the sacred, with daily life in the context of a particular tribal group."

Plaintiffs' Page Six, the numbered paragraph at the bottom of the page repeats that assertion; and then on Plaintiffs' Page Seven, there's a paragraph that relates, I think, directly to the meaning of some of this. This is the second full paragraph on Page 123.

"Many Native American peoples today retain, even though often in fragmented manner, elements of a heritage

of ancient primordial origins. Present within all the dimensions, [192] forms and expressions of this heritage, or rather of these multiple heritages, is a pervasive sense for the sacred. In one manner or another all life is seen to participate in the sacred, all cultural forms express the sacred, so that inevitably within this context the lives of those peoples who live close to their sacred traditions may be called religious, and they are thus beings who are religiously human. Religion pervades all of life and life's activities leading a native person once to remark, 'We do not believe our religion, we dance it!'"

Now, I've called this to the particular attention of the Court because it speaks to the primal elements, the basic, the fundamental principles underlying all, says Joseph Epes Brown, virtually all native American traditions; certainly all of which I have any knowledge.

These primal elements relate to the interrelatedness, the lack of separation between religion, art, the politics, the society, the economy that one is embedded in related to the other; that they form a seamless web, it could be argued. If that's the case, then it follows that surely when we come to this diversity, the Abenaki—if you can refer to the Western and Eastern Abenaki collectively as the Abenaki—that the Abenaki have very specific beliefs, that there are primal elements, fundamental elements that made their views very similar to those of the Narragansets, very similar to those of the [193] Sioux, as a matter of fact, because they rested on this same bedrock of primal principles.

Q. Now, Professor, you've heard Stephen Roy testify about some of his ways of observing native American traditions, such as acquiring the stone for his pipe, the gathering of herbs, the fact that he doesn't make decisions for or punish his children, going to the holy grounds, and Little Bird's birth ceremony.

You've just mentioned these fundamental principles. Are these ways consistent with the fundamental principles of native American tradition?

A. Fundamentally consistent. I think lest we get too many "fundamentals" here, yes quite consistent.

Q. Are there any writings that you might rely upon in reaching that conclusion, that you did rely upon in reaching that conclusion?

A. Yes.

Q. Could you elaborate as to how these ways that Stephen mentioned are consistent?

A. This morning in the court room, if I heard him correctly, Mr. Roy noted that: We don't beat our children down, that we don't use violence, that we don't flog.

As you will note as you read carefully Plaintiffs' Exhibit No. 9—

MR. HIRT: Your Honor, let me interrupt again. I [194] just want to make clear that I'm going to have—rather than popping up to interrupt—that I have a continuing objection not just to the exhibit that I've been overruled on but, just for the record, that the other exhibits which do not deal with Abenakis specifically I do have an objection to; and I'll await the Court's ruling, but I want to make sure I preserve those objections.

THE COURT: We will overrule the objection as to the generality of this, but I don't want to have you misled. If you want to object to any particular portion that's being read, I'm perfectly willing to consider that as well.

MR. HIRT: Thank you, Your Honor. The only problem is that the witness is speaking faster than I can get up and interrupt him, so I wanted to; at least have a prophylactic objection to make sure that it is preserved.

THE COURT: I think you ought to object whenever he starts to read something that you don't think is appropriate.

All right. You may go ahead.

BY MR. MILES:

Q. You may continue, Professor. My last question, to refresh the recollection of everyone, was: How those ways that Stephen Roy talked about were consistent with the traditions of native Americans.

A. Yes, and I had said that I observed or heard this morning Mr. Roy testify about the way they respond to their [195] children, the absence of corporal punishment: We don't beat our children—that kind of statement; that this is reflected, I think, and speaks very directly to the Abenaki—in

the Smithsonian—in Plaintiffs' Exhibit No. 9, Page One, in which under the heading, "Life Cycle," Fay notes the following:

"Abenakis were affectionate parents, and children were not struck. In general, education and discipline consisted of traditional stories often repeated, grave admonitions, and the pressure of group disapproval. Punishment often took the form of blackening the child's face and putting him or her outside the wigwam for a time. Disobeying an order affecting survival might receive prompt, fitting punishment."

Now, that response to the young, profoundly religious, going beyond matters of toilet training or periods of feeding, going beyond this to the root principle; and that is that all of life is sacred, that the world itself is luminous, suffused with a kind of holy light. As a part of this suffusion of the sacred, each individual receives a part of this energy.

Among the Algonquian speaking people, it was called manitou; among the Siouan speaking people, wakanda; and among the Iroquois, orenda; all the way out to the Yuroks with their wesonah. In each instance, it related to the fact that each person among the Yuroks was, from ten weeks after conception, each person is a receiver of this holy energy, this power in the world, in the universe, within society; and [196] as such, had to be treated with profound respect, as a unique spirit that had to be a guarded treasure.

Now, the Abenaki. I've just touched on the Smithsonian entry here for the Western Abenaki. Similar indications could be made for the Eastern. For modern purposes, most people refer to the Abenaki collectively.

What I would like to do would be then to simply indicate how this was also reflected half a continent away among the Siouan people, and here I'd like to read from—

MR. HIRT: Your Honor, I want to make clear that I have an objection to his going way beyond the question to now yet another tribe; and if it's within the scope of the question, there may be some proffer here, but I think that Professor Drinnon is going way beyond the scope of the original question.

MR. MILES: Your Honor, this case is not just about Abenakis. I think that has to be made clear. I think Mr. Roy

made it clear. I think Professor Deinnon has made it clear here that there are fundamental principles that pervade all of these native Americans, of which the Abenakis happen to be a tribe.

Mr. Hirt continues to restrict his perception to a single tribe, as he would to comparing Catholics against Protestants. I think both Professor Deinnon and Mr. Roy have made it clear that that's not the situation here.

[197] The issue in this case that's being discussed here by Professor Deinnon is whether or not Mr. Roy has a religious belief. It's not whether it's Abenaki, and I think that Professor Deinnon's answer is not going beyond the scope of the question. He's simply responding to my question about the fundamental principles of native Americans as simplified by practices in other tribes. So, I don't think it goes beyond the scope of the question.

THE COURT: If we hear about the Sioux, we're going to hear about the Apache. I can think of a dozen Indian tribes.

It seems to me that what we ought to have is what we can about the Abenaki and also what we can generally. I don't understand why it's necessary to go into the tenets of the religion of the Sioux.

MR. MILES: Perhaps, Your Honor, I can focus my inquiry to Professor Deinnon on the native American traditions as they are—again, it's a circular problem.

I've asked him about native American traditions and how Stephen Roy's practices are consistent with those, and those traditions are embodied and expressed in other tribes as well and not simply by the Abenakis.

So, in a sense—and this is the circular area that the professor is talking about—when we're talking about some of these fundamental principles with the Sioux, they apply [198] as well to Mr. Roy; but I'll try for the Court's patience to narrow the inquiry if I can.

THE COURT: I'm going to sustain the objection as to the particularization with respect to the Sioux unless you can't bring it out any other way; but it does seem to me we can certainly find out what is general or what is common to the native American culture, of which apparently there were

3,000—maybe he said 30,000 of them. How many did you say?

THE WITNESS: I said 2,000 and more cultures and more societies, Your Honor.

THE COURT: Well, let's try to find out what we can within those parameters.

* * * * *

[201] BY MR. MILES:

Q. Professor Drinnon, could you briefly explain how the practices and ways—whether the practices and ways that I described earlier and that Stephen Roy testified to are consistent with fundamental principles of native Americans?

A. I shall try. When Stephen Roy notes that he and Karen Miller do not flog their children, do not beat them down, it is fully in keeping with the kind of surroundings of love, of continuing concern and treating as unique spirits within this universe of spiritual power, treating them as unique entities, consistent with the kinds of materials one reads on child rearing practices among primal people, among primal people in a number of different areas.

The kindness and the nurturing and the willingness to let the child decide for her or himself, this I've heard among—it's entirely consistent with, as a matter of fact, identical with the writings on how one has to let the other [202] person have her or his own capacity for choice.

As I heard the cross examination, when the question was raised, "Well, when would Little Bird of the Snow be ready to make a decision, would you then turn to her and say, 'Look, you don't want a Social Security number?' his response was: Well, she'll have to come—and I'm not trying to—let me just give you my interpretation of what I heard. No, it will be something she'll have to come to herself.

This extraordinary respect for the other, for letting the young discover things for themselves. The world that these European invaders found over here was a world in which there was an insistence upon experiencing rather than explaining. Hence, when Mr. Roy said, "Well, she will have to make the decision, but I won't tell her one way or another what she had to do," it's entirely consistent with that.

The other items, all of them, including his pilgrimage out to get some catlinite pipestone, the burying of the placenta, entirely consistent. The umbilical cord is buried for the spirit to take root.

When it comes to sacred places, his expeditions to these sacred places, this too presumably was to have been protected under the Religious Freedom Act of 1978. Consistently as I've heard him, it has been congruent with everything that some of these leading writings have had to say, both from within and from without the native American works.

[203] Q. Would it be possible for another native American, other than Stephen Roy, to have a Social Security number and still hold to some of the beliefs of the native American tradition?

A. Yes.

* * * * *

[204] BY MR. MILES:

Q. Professor Drinnon, why would someone, a native American like Stephen Roy, find a Social Security number objectionable for his daughter and perhaps another native American not?

A. Mr. Roy—

MR. HIRT: I want to interject an objection, which is that there's been no foundation for any testimony in terms of any of the exhibits or any of the oral testimony that Social Security numbers, insofar as they are numbers of identifiers, has anything to do with the native American tradition, at least from the mouth of this witness; so I don't think there's a foundation for him to answer this question at this point. At least I'd like to know what the link is.

THE COURT: I don't understand what your objection is. You'll have to put it another way, counsel.

MR. HIRT: As I understand it, Professor Drinnon is being asked the relationship of the Social Security number to various native Americans of various persuasions, but I don't understand from his prior testimony that there's been any foundation to deal with what native Americans of any particular religious tradition say about numbers or the concept behind the number.

MR. MILES: Your Honor, that's not the question. I asked him previously whether it would be possible for a native [205] American to have a Social Security number. This was a matter raised in the hearing on cross examination, whether a native American could have a number and still hold to certain native American beliefs; and Professor Drinnon's answer here today was: Yes, that's possible.

My question now is: Why is it possible for some native Americans not to find that objectionable but for Mr. Roy to find that objectionable? I'm not asking him about the relationship to the belief; but you'll find from the answer that it does have to do with the religious understanding of the native Americans.

THE COURT: Well, is this within your field of expertise that you can answer that question?

THE WITNESS: I think.

THE COURT: Is this just something that anybody would know: That "A" has a religious belief and "B" may not have the same belief?

THE WITNESS: I don't think anyone would know it. I don't know that it's common knowledge.

THE COURT: All right. Well, is this within your sphere of expertise; do you think?

THE WITNESS: I think.

THE COURT: All right. I'll overrule the objection.

MR. MILES: Thank you, Your Honor.

[206] BY MR. MILES:

Q. Do you remember the question, Professor?

A. I do. It depends on, in my judgment, the level of awareness, on the fantastically difficult task facing those from tribal backgrounds of relating these primordial traditions—beliefs, traditions, I use interchangeably with Indian religions—relating these traditions to modern circumstances.

Mr. Roy used the term "level of awareness." It seems to me entirely possible that someone trying to hold on to, to reestablish relationships with these primordial traditions, might well rise to the point and do as he did, and that is to say that it is in fundamental conflict with what we would call religious convictions; what he would call, I would gather, his traditions.

In this circumstance, it seems to me that he's explained, having heard an Abenaki chief lecture in Harrisburg, talk about getting his affairs in order, getting affairs in order for his children, that that seemed to him a good thing to do. Now, it's entirely possible to relate that growing level of awareness, I would suggest, to the kind of vision quest that may be something that takes place out on the mountaintops or it may be indeed over a period of time that he, in fact, came to this conclusion.

Insofar as I understand anything about native American traditions, within these traditions, based on this [207] primal—these primal principles, this bedrock of primal principles, that there would be the utmost respect for him, even if some of his tribespeople disagreed with him; respect for him because this is his vision, this is how he relates this; and for him to have this respect, he passes it on to Little Bird of the Snow by not interfering with her, by not having her identified from the outside, by respecting her uniqueness, her individuality.

Q. Professor Drinnon, I promised the Court that I would finish by five, and I'm hoping to keep that promise. I have one final question.

Stephen Roy talked about his objection to the Social Security number and his problem with the uniqueness of the number. Is that objection consistent with what you understand to be the fundamental principles or among the fundamental principles of native Americans?

A. Anything that would rob an individual of this individual's personhood, uniqueness, would be antithetical to, yes, in this context. I would simply reiterate, briefly reiterate that this rising level of awarenes, this kind of attempt to protect the individuality of—

Q. If you could just sit back.

A. —attempt to protect the individuality of his younger daughter strikes me as entirely consistent with what I know about native American traditions; and that is to say [208] religion.

MR. MILES: That's all I have. Thank you.

THE COURT: All right. It's now 4:57. We'll adjourn for the day and pick this case up again tomorrow morning at ten o'clock. Thank you.

(Court adjourned at 4:57 p.m.)

[209] **INDEX TO WITNESSES**

For Plaintiffs:	*Direct*	*Cross*	*Redirect*	*Recross*
Stephen J. Roy				
By Mr. Gildin	49		151	
By Mr. Hirt		109		145
				148
By Mr. Ressler		136		
Richard Drinnon				
By Mr. Miles	153			

INDEX TO EXHIBITS

Plaintiffs' Exhibits:	*Identified*	*Admitted*
No. 1—Receipt for prescription drugs	98	152
No. 2—Receipt for dental services	98	152
No. 3—Receipt for dental services	98	152
No. 4—Excerpts from "Land of the Spotted Eagle," by Luther Standing Bear	176	
No. 5—Excerpts from "Primitive Man as Philosopher," by Paul Radin	177	
No. 6—Excerpts from "The Spiritual Legacy of the American Indian," by Joseph Epes Brown	177	
No. 7—Excerpts from "Native American Testimony, An Anthology of Indian and White Relations," edited by Peter Nabokov	177	
No. 8—Excerpts from "Doing Your Thinking," by Thomas Buckley	177	
No. 9—Excerpts from "The Western Abenaki," by Gordon M. Fay	177	

[2] [Friday, May 18, 1984]

(Court reconvened at 10:00 a.m.)

THE COURT: Do you wish to call another witness, counsel? Oh, excuse me. Dr. Drinnon is under cross examination.

(Dr. Richard Drinnon resumes the witness stand.)

THE COURT: Now, I didn't make any entry that Mr. Miles had concluded his examination, but that's my recollection. Is that correct?

MR. MILES: That's correct, Your Honor.

THE COURT: All right.

MR. MILES: I would only ask that the exhibits, which I removed from the witness stand, remain there in case Professor Drinnon decides to refer to them during his cross.

THE COURT: All right. You may go ahead, counsel.

* * * * *

[3] CROSS EXAMINATION

BY MR. HIRT:

Q. Professor Drinnon, I'd like to ask you a few questions based upon some of your prior testimony.

First, as I understand your direct testimony, you are not being paid to testify; is that correct?

A. That is correct.

Q. Have you had any conversations with plaintiffs' counsel concerning whether you might be compensated in this case?

A. No.

[4] Q. Has the matter of your compensation been raised in any way between you and plaintiffs' counsel?

A. It was raised last spring and dismissed as a possibility for expenses or for per diem for any expenses and has not been raised again.

Q. So, in other words, the plaintiffs' counsel haven't indicated to you that, if they won this case, you might be eligible for some sort of compensation?

A. They have not.

Q. Do you have any awareness as to whether that might be the case?

A. I have an awareness that it would not be the case since I am not interested monetarily in this case and its outcome.

Q. Well, are you a lawyer, Professor Drinnon?

A. I am not.

Q. So, really, you don't know whether or not you are entitled to compensation, strictly speaking?

A. What I am trying to be responsive, counsel, to the question, and that is, am I going to be interested, be entitled. I would not accept it were I entitled.

Q. You would not accept compensation—

A. No.

Q. —even if the Court ruled in favor of the plaintiffs?

[5] A. I should not.

Q. Fine. Professor Drinnon, do you yourself have a Social Security number?

A. I do have.

Q. You do have one?

A. I do have a Social Security number.

Q. Do you object when government agencies ask you to provide it to them?

A. I have not.

Q. Do you have any philosophical objections to it being asked of you in the context of, let's say, a government program?

A. I have no objections which I have voiced. I can appreciate Mr. Stephen Roy's objection in the context in which he advances them.

Q. You've spoken a little bit about individuals in the field of native American relations and history who you would consider authoratative. Is Frank G. Speck one of those people?

A. An authority on the Indians of the northeast, yes.

Q. Thank you. Based upon your sitting through the case and evaluating Mr. Roy's testimony, do you hope that Mr. Roy will win this case?

A. Yes.

Q. Do you feel that the federal and state governments have done him an injustice by forcing him to choose between [6] foregoing these government benefits and providing something which you consider to be contrary to what you understand his religious beliefs to be?

A. Yes, and may I explain?

Q. If the Court wishes you to explain, fine. I'd like witnesses to answer my questions yes or no if they can be answered yes or no.

A. Yes.

THE COURT: Well, I don't know what—

MR. HIRT: Well, if there's no objection pending by the plaintiffs counsel, then I think I can go on to another question.

BY MR. HIRT:

Q. Do you believe that the government's conduct in this case is consistent with the government's relationships to native Americans generally?

A. I think that the state and federal authorities have acted in traditional ways, ways that congress and the Indian Religious Freedom Act of 1978 characterized as inflexible and insensitive, based on certain federal statutes inflexibly interpreted and insensitively interpreted.

Q. Well, is it your opinion today that the United States Government generally is, if I can use the term, anti-native American?

A. I think that the anti-native American tradition, [7] one that I characterized in the book, "Facing West," as Indian hating, has continuities into the present, counsel.

Q. And in fact, isn't it true that in your book, "White Savage," you made the statement, "No longer can any thoughtful person turn to the United States Government or any other as the embodiment of a progressive destiny"? Isn't that true?

A. In the context of "White Savage," John Dunn Hunter's life and what the response to him was, yes; and I've already indicated that I think there are continuities in that anti-native American, Indian hating as I call it in the other book, into the present.

Q. Continues into the present.

A. Yes.

Q. Do any native American tribes have specific words that could be translated, if I can use that term, into the word "prayer"?

A. The translation is always tricky. When Mr. Stephen Roy referred to going out to bury the placenta of his

younger daughter, Little Bird of the Snow, and then noted that he had offered a prayer, when he was asked by plaintiffs' counsel if he could divulge that prayer, he said: No, that would rob her of the power deriving from the prayer.

In that sense, he was using "prayer" integrally to his own understanding of Abenaki and native American traditions.

[8] Yes, they have acts that can be roughly translated, but the translation is always a difficult matter.

Q. Can I assume from your testimony that native American tribes would also have a word that could be translated into the word "soul"?

A. Yes. Again, with difficulties in the translation.

Q. Have you ever visited—if I can pronounce the term correctly—the Odanak reservation in Canada?

A. I never have.

Q. Other than Mr. Roy, have you met any individuals who identified themselves to you as Abenakis?

A. No.

Q. Do you know what the term "Abenaki" means?

A. A designaton of peoples, speaking roughly three dialects, living along the drainage systems in upper New England, including the Penobscot and Kennebec.

Q. I think you misunderstood my question. What I wanted to ask you, if it wasn't clear was: What does the term "Abenaki" mean? What would we translate that into?

A. Within their bands, to my knowledge, it means "the people."

Q. Just "the people"?

A. "The people," but I have no specific knowledge of the translation of the term.

Q. Well, I assume that you've read, in preparation for [9] this case, the article by Gordon Day on Western Abenaki.

A. Yes.

Q. So, if he used the term "dawn land people," would that sound accurate?

A. It would sound accurate, yes, an extension of "the people."

Q. Excuse me?

A. An extension of "the people," "dawn land people."

Q. That's different from "the people," though; isn't it?

A. Yes, an extension of it.

Q. Do you know whether any native Americans, apart from the Roy family, have Social Security numbers?

A. Personal knowledge, I do know that some have.

Q. Do you know of any instances, other than the Roy family, where native Americans have indicated that they have a religious objection, if I could use the term the way you've defined it, to getting Social Security numbers?

A. I have no personal knowledge.

Q. Do you have any opinion as to whether such individuals would exist?

A. I have an opinion that they might very well exist.

Q. All right.

A. Let me—may I explain or not? I have an opinion that they may well exist, yes.

[10] MR. MILES: I think he should be permitted to explain. You didn't ask for a yes or no answer.

BY MR. HIRT:

Q. All right. Go ahead.

A. It's frequently stated that the only time that there has ever been an accurate census of the hundred thousand plus Navaho on the 14-million-acre reservation was during World War II when they had to get sugar stamps, with sugar rationing and the like; that there are very probably a very considerable number who remain uncounted, admittedly so; very probably a considerable number who object on the basis of Navaho traditions to being counted, to being photographed, to being enumerated, to being identified from the outside by a Social Security number. This seems to me to be a strong probability.

Q. Okay, fine. I think in your direct testimony you also elaborated upon some of the criteria that Mr. Roy identified in terms of his religious traditions, such as his attitude toward the child rearing; and I think you said, if I understood your direct testimony, that his statement that children should not be beat down is consistent with native American tradition.

Is that your testimony?

A. It was.

Q. Now, if I could ask you this question: Do you share Mr. Roy's belief that children should not be beaten—or I think you used the term "flogged"—by their parents?

[11] A. I do.

Q. Do you derive that belief out of any particular religious tradition or value that you hold?

A. I derive that belief in part from my study of native Americans in the 17th, 18th, 19th and 20th centuries, the continuing refrain that native American parents were allowing their children to run wild at a time when "spare the rod and spoil the child" operated in our public schools along with—public schools and private schools for that matter.

Q. Professor Drinnon, I don't like to interrupt you, I don't want to appear impolite, but—

MR. MILES: Your Honor, I'm going to object.

THE COURT: Well, wait to find out what he's going to say, and then I'll hear you, Mr. Miles. Go ahead.

BY MR. HIRT:

Q. My question to you was not, "How did you derive Mr. Roy's basis for his belief?" but what was your basis for your own belief on flogging children or not flogging children.

I'm asking you for your personal perspective, unless you derive it as well from a native American perspective.

MR. MILES: Again, Your Honor, I'm going to object to Mr. Hirt's attempts to limit the explanation by the witness. Furthermore, the witness did testify or began by testifying that he derived that belief from his studies and was going on to explain that.

[12] THE COURT: Well, I thought it was responsive, so I'll overrule the objection.

BY MR. HIRT:

Q. Go ahead, Professor Drinnon.

A. That from this study and from a growing sense of the value, the sacredness placed upon the individuality, the particularity, the uniqueness of each individual, it came to me, belatedly, I must say, since my father flogged me and on occasion, to my distress, I administered corporal punishment to our two children, that this was, in fact, perpetuating patterns of violence that relate to the incidence of violence in the dominant culture. For this reason, among others, why I

think I've learned from Mr. Roy and other native Americans.

Q. Well, do you yourself follow native American traditions as a religion, if I can use that term? You obviously can explain what you mean.

A. I am a student of native American cultures, and that means perforce of native American religions. I am not a participant in their inner mysteries. I try to understand and as a mater of fact try to learn on occasion from them. I think they have much to teach us.

Q. Well, let me come back to my question or a different question perhaps, which is: Is your present view about corporal punishment, is that based upon any particular religious belief that you hold, apart from what you've learned from the native [13] tradition?

A. It would be in part. Since World War II, I've come to question increasingly the use of force, violence. I was in the Navy Air Corps during World War II, returned from it convinced that my service had been of some worth. In the decades following, I guess I've questioned more and more the possibility of achieving humane ends through violent means, counsel.

Q. Well, let me come back to the question again, which is: Is there a religious basis for those beliefs that you have just imparted to us, and in which case, from what sect, if that helps you?

A. The problem with the use of the term "religious basis" exists even within our dominant culture. For example, during the '60s and '70s, I did a great deal of draft counseling for those who were considering conscientious objection. Whether the conscientious objection was religious, philosophical or merely political was a vexed matter; and those instances in which the person being counseled was not a member of the traditional peace churches; that my own views—and using Western terms—do not rest on what we call religious objections to the use of violence. This seems to me very likely.

If we were to use terms such as the native Americans have used, then these would be religious objections.

THE COURT: I missed one word. Then, this would be the blank—

[14] THE WITNESS: Then my objections would rest on cultural—and that would mean perforce religious—objections.

BY MR. HIRT:

Q. Well, let me see if I understand that distinction you're making. Are you saying, then, that there is a religious component to your objection to corporal punishment of children?

MR. MILES: Your Honor, I'm going to object. I've allowed Mr. Hirt to ask several questions about Professor Drinnon's particular beliefs; but frankly, I fail to see the relevance in this line of inquiry.

The issue here today is whether or not Stephen Roy's beliefs are religious in nature, and Professor Drinnon's beliefs are not on trial here. So, I object to any further questions along this line.

MR. HIRT: Well, my response, Your Honor, would be that I think we have a witness who's testifying to someone else's ability or inability to separate religion from culture, and he's used several examples, the children one in particular; and I'm interested in how Professor Drinnon analyzes in his own mind the differences between religion and culture, since he's evaluating someone else's perspective on that. So, I think it is relevant, and that's why I'm trying to find out how Professor Drinnon draws his own distinctions.

THE COURT: I've already heard you, Mr. Miles. I'm not going to seesaw. Furthermore, I'm going to sustain the [15] objection. I do not see anything wrong with an inquiry as to how Dr. Drinnon distinguishes these items or coalesces them; but I do think that it's not proper to ask him as to his own personal religious beliefs or other beliefs.

MR. HIRT: Okay. Fine, Your Honor.

BY MR. HIRT:

Q. Professor Drinnon, would you agree with me that each native American tribe has its own unique religious tradition?

A. That question I can't answer yes or no.

Q. Well, let me ask you this: Would you agree with me that, to determine what the beliefs of an Algonquian speak-

ing people are cannot be resolved by looking to what the Lakota Sioux believe?

A. That again doesn't admit of a yes or no answer to my mind.

Q. Well, Professor Drinnon, if you have a situation where a person from an Algonquian tribe said, "I have a certain belief system," would you try to compare that to a Lakota belief system to determine whether the Algonquian belief system was, in fact, religious?

A. I might well, since I think that there are commonalities, that there are primal elements that relate to both Siouan speaking and Algonquian speaking peoples. For example, the great sociologist/anthropologist, Paul Radin—and primitive [16] philosopher—dealt with a number of different tribes. He found commonalities.

For example, a man named Neil Salisbury, who has recently published a book entitled, "Manitou and Providence," and in there he was dealing with peoples from a number of different areas within the Algonquian speaking peoples, and he indeed had to relate these different peoples to each other.

The Sioux holyman, Lame Deer, put it this way, and that is: I think it really comes down to this; that all our Indian religions are grounded in the same belief, in the same mystery. Our unity, it's in there.

That's a rough paraphrase from Lame Deer's "Seeker of Visions" that I mentioned yesterday.

THE COURT: Our unity what? There was one work that I'm having a little trouble with.

THE WITNESS: I'm sorry. I'll speak up, Your Honor.

THE COURT: Well, maybe I'll ask the court reporter to read it back. Our unity blank.

(A portion of the preceding answer was read back by the reporter.)

THE COURT: I couldn't hear you. Our unity what? That's the part.

THE WITNESS: That's the part. May I help here?

THE COURT: I think it would be better if I got what she has. You can read it back.

[17] (A portion of the preceding answer was read back by the reporter.)

THE COURT: All right.

BY MR. HIRT:

Q. Now, Professor Drinnon, you testified that Joseph Epes Brown is an individual who you consider to be authoritative in terms of native American tradition. Am I correct?

A. I do.

Q. Now, doesn't Professor Brown also say that, out of the foundations of these still lived primal elements, there developed in the Americas through time and across space specific traditions of great diversity?

A. Yes.

Q. Isn't that what he said?

A. Yes.

MR. HIRT: Okay. Thank you.

CROSS EXAMINATION

BY MR. RESSLER:

Q. Professor, I have just a few questions. How many times have you met Stephen Roy?

A. Twice.

Q. When were those times?

A. Twice, if we include yesterday and today as once, and once at the hearing on May 13th, last spring, at the DPW.

[18] Q. So, you've only met him in a trial setting.

A. That I have, pre-trial and trial setting.

Q. Your knowledge of Mr. Roy's conduct is based solely upon the testimony he provided at these hearings?

A. Solely on the testimony, with this exception; and that is, at the hearings down in Harrisburg, Karen Miller, Renee Ann Roy, Little Bird of the Snow Roy were present. They came into the hearings, since this was largely informal, approached their father as though the hearings were not going on. He responded with extraordinary patience and as a matter of fact exhibited some of the matters that we've been discussing here about restraint, about responding with great agitation to children who are disrupting what grownups are about.

Q. Have you been in court rooms very often?

A. Not with great frequency, no. I haven't been in a court room for ten years, I think.

Q. Do you think it's a fair statement that most people in court rooms act restrained and attempt not to offend other persons in the court room?

A. I should assume so.

Q. Do you have any personal knowledge that Mr. Roy took a trip to Minnesota?

A. No personal knowledge, other than his testimony to that end.

Q. You stated in response to Mr. Hirt, you used the [19] phrase, "Spare the rod and spoil the child." Do you remember when you used that phrase?

A. I do that.

Q. Was that when Mr. Hirt was questioning you about the beating or flogging of children by their parents?

A. Yes.

Q. Have you heard of Dr. Spock?

A. I have.

Q. Is Dr. Spock's philosophy that one should spare the rod and spoil the child?

A. I should think not.

Q. Would it be fair to say that Dr. Spock is rather well known on the subject of raising children?

MR. MILES: I'm going to object. I'd like an offer of proof. I don't understand what this inquiry has to do with. There's certainly been no offer that Dr. Spock is any expert on native American traditions, which is again the subject of this inquiry; and I fail to see the relevance in this line.

THE COURT: You've asked for two things. You object and you ask for an offer of proof. I think we ought to take the objection first.

MR. MILES: Yes.

THE COURT: Then, if you want an offer of proof, all right. How is it relevant, sir?

MR. RESSLER: Your Honor, I believe the witness [20] testified that the—and I'll use the term loosely—the white man's tradition, as contrasted to the native American tradition, is that one does not flog one's children, but the white man's tradition is that one does flog one's children; and I'm just attempting to see if the professor believes that that is

still the case or if he was using that only in an historical context.

THE COURT: All right. I'll sustain the objection.

MR. RESSLER: No further questions.

THE COURT: Ms. Allaben?

MS. ALLABEN: I have no questions, Your Honor.

THE COURT: Any redirect?

MR. MILES: No redirect, Your Honor. At this time, Your Honor, we would move the admission—

THE COURT: Just a second. Mr. Hirt still has a shot at the witness if it's relating to something new, if any, brought out by Mr. Ressler. Any questions, Mr. Hirt?

MR. HIRT: No, Your Honor.

THE COURT: Now, go ahead.

MR. MILES: Your Honor, at this time, plaintiffs would move for the admission of Plaintiffs' Exhibits Four through Nine.

THE COURT: Any objection?

MR. HIRT: Yes, Your Honor.

THE COURT: On what basis?

MR. HIRT: Rule 803 of the Federal Rules of [21] Evidence, Subsection 18, provides—under the heading of "Learned Treatises"—that statements may be read into evidence from the learned treatises but the treatises may not themselves be received as exhibits.

MR. MILES: Your Honor, 803(18) does indeed say that; however, that objection was not raised by either of counsel for the defendants during the pre-trial proceedings. Their only objection at that point was relevance, so I think they've waived any objection as to admissibility under 803(18).

THE COURT: I do not think it's incumbent upon counsel at the pre-pre-trial conference or in any pre-trial proceedings to disclose all of their objections to documents. My recollection is: All they're obliged to do is disclose objections relating to authenticity.

Furthermore, the same pre-trial order does provide that only those portions read into evidence will be considered by the Court. So, it seems to me that the proper thing to do here is to admit into evidence the portions of the documents which have been read in open court, and that we will do.

MR. HIRT: Your Honor, I have a separate objection.

THE COURT: All right, I didn't realize it. We've got to get all of these objections before we rule. What's been happening in this case is that I'm about to make a ruling and then I get another objection or another reason, or I've already ruled, as I did in this case, and then I get another objection.

[22] So, I'll vacate the ruling. Go ahead, Mr. Hirt.

MR. HIRT: The second objection, which we had raised at the pre-trial conference, Your Honor, which is a relevancy objection; I've raised that same objection I think in the past when we got into the professor reading from the various articles, my continuing objection is that the articles, with the exception of that on the Abenaki, do not deal with the Abenaki tribe, which is the one with which Mr. Roy says he's affiliated, and I object to the relevancy of the exhibits insofar as they do not relate to the belief systems or culture of tribes other than the Abenaki.

THE COURT: All right. Well, we'll adhere to the ruling I've just made. I think that everything that's been read is sufficiently relevant, and we should consider it. So, we'll do that.

Now, are we through with the witness?

MR. MILES: Yes, Your Honor.

THE COURT: All right. You may step down. Thank you.

MR. MILES: Your Honor, at this time, I would introduce Plaintiffs' Exhibit Fourteen, which is the adjudication rendered in the Department of Public Welfare's hearing, and Plaintiffs' Exhibit Fifteen—

THE COURT: Well, let's take them one at a time. Do you have a copy of 14?

[23] MR. MILES: Yes, Your Honor.

THE COURT: What portion of it do you want read in open court or do you want to read?

MR. MILES: Let me provide a copy to you, Your Honor.

THE COURT: We need a copy for me and a copy for the law clerk.

What portion of this do you want us to read? When we get into voluminous documents, and if there's some good reason to do it, we will read silently a portion of the document or

portions; but this has the terrible disadvantage that it always encourages counsel to give us an avalanche of reading, and nine times out of ten, we end up reading a whole lot of data which is of no importance or which is completely irrelevant.

What portions, if any, do you want us to read; and I'll find out if there's any objection to it?

MR. MILES: Your Honor, you'll see that it's not an avalanche; it's four paragraphs. On Page Four of Plaintiffs' Exhibit Fourteen, I would to read or have the Court read the first paragraph under the heading, "Discussion," which begins with, "The appellant testified ..." and then the first sentence of the next paragraph.

THE COURT: The "A"? I'm not clear as to which—

MR. MILES: On Page four, where it's headed "Discussion."

[24] THE COURT: Yes.

MR. MILES: Beneath the subheading, "Is Petitioner's belief 'sincerely held'?"

THE COURT: You want me to read the next paragraph?

MR. MILES: The next paragraph.

THE COURT: All right. Let's find out if there's an objection to it.

MR. RESSLER: There is an objection. Your Honor, this Court is the finder of fact in this case. It seems to me that what another finder of fact found is not binding on this Court and is really irrelevant to this Court. We have a de novo proceeding.

Plaintiffs had an administrative hearing. They chose not to continue any administrative process. They left the state court system. This adjudication would have been binding upon both the state and the plaintiffs if they had stayed in the state court system; but they chose to go to federal court. We fail to see the relevance of this.

Mr. Roy has had his opportunity to testify to the Court. We think the Court should base its ruling on whether his beliefs are sincerely held based on the testimony presented here and not on the testimony presented at some other time and some other place.

MR. HIRT: Your Honor, I share Mr. Ressler's objection, but I have a different set of objections. The first [25] objection which I have, and maybe this is a technical objection, is that I believe that this type of exhibit should not be admitted into the record selectively because then each side is going to say: What selection do you want? I take an all-or-none position; in other words, that's a technical objection.

The second objection I have is that this adjudication also did not involve the federal government as a party. It, in particular, only involved the food stamp part of the case, to which Defendant Block is not even affiliated. So, I think that we have an objection as well that the federal government was not even involved in this proceeding, and certainly not the Department of Agriculture.

THE COURT: What's your response?

MR. MILES: Your Honor, your pre-trial order requires that counsel lodge any objections to both the authenticity and the admissibility of the exhibits.

THE COURT: Where does it say that, please?

MR. MILES: That's what I'm trying to find in the order because we discussed both of those.

THE COURT: Probably in Paragraph 5.13.

MR. MILES: Yes. It's cross-referenced to Local Rule 408.3, Your Honor.

THE COURT: Let me see it. Let me find it first. 5.13, all right.

MR. MILES: Beginning about two-thirds of the way [26] down in that local rules, Your Honor, quoting—

THE COURT: Wait until I get that now.

MR. MILES: I'm sorry.

THE COURT: What's the number of it?

MR. MILES: Local Rule 408.3, Conference of Attorneys.

THE COURT: Yes.

MR. MILES: About three-quarters of the way down, the sentence reads, after the beginning part, for good cause shown. Have you found that, Your Honor?

THE COURT: I see it.

MR. MILES: "Counsel shall attempt in good faith to agree as to the authenticity and admissibility of such exhibits insofar as possible and note an objection to any not so agreed

upon. Counsel shall attempt in good faith to agree insofar as possible ..." and it goes on.

There was absolutely no objection lodged to the admissibility of either of the exhibits which we're proffering at this time.

MR. HIRT: Your Honor, I think that's a misstatement, if I may interject, because I would say, for my own purpose, that I did not object per se to the admission of that exhibit at that time, but what plaintiffs are doing now selectively choosing portions of those exhibits which fit their theory of the case; and I certainly have the right to object to [27] their changing their theory.

THE COURT: Well, are you saying that you do not object to the exhibit as a whole?

MR. HIRT: Well, Your Honor, I want to take an alternative tack, if I can say this, which is that in the undisputed facts, which we put together, we recited the results of this adjudication.

THE COURT: But I've got to get an answer from you as to whether you object or do not object to the admission of the exhibit as a whole.

MR. HIRT: Well, I will be frank and say that I did not raise a wholesale objection at the conference to the admission of that entire document, but I certainly did not waive an objection to what plaintiffs are doing today.

MR. RESSLER: Your Honor, if I may speak to that point, my recollecton is that at the least, we had a heated discussion among counsel as to the admissibility of this particular document; and I believe that I did, during that discussion, object to it. Now, I am looking through my notes for a confirmation of that, but I have to admit that I am basing that on recollection; and it could be that the end result of that discussion was an agreement, as Mr. Hirt just stated, that we would put in the undisputed facts what the results of that adjudication were, and I don't recall all the specifics.

THE COURT: All right. Now, what's your reply?

[28] MR. MILES: Well, my response simply is, Your Honor, first of all, that Mr. Ressler can't recall whether he objected. I am representing to the Court that no objection

was lodged as to the admissibility of these exhibits; and I think that it was incumbent upon them to make that objection known at that conference, and they've waived any objection.

MR. RESSLER: Do you dispute that we had a heated discussion?

THE COURT: Wait a minute, counsel.

MR. MILES: Yes, I do.

THE COURT: All right. Well, I'm going to exclude the document because there's some dispute between counsel as to whether it was objected to, and I have a feeling that there may well have been a misunderstanding.

However, I don't see what relevance it's got to this proceeding anyhow. I frankly couldn't care less what some hearing examiner for the Department of Public Welfare found on the facts. I doesn't seem to me to be of any great significance. Furthermore, we took care of this, I thought, on the motion for summary judgment, which we just got out a couple of days ago. So, I will sustain the objection to this document, Plaintiffs' Fourteen.

Now what's the next one?

MR. MILES: That next exhibit rode upon the admission of this earlier exhibit, Your Honor, so we'll withdraw the [29] proffer.

THE COURT: All right. Do you have another witness?

MR. GILDIN: Your Honor, I have another exhibit. This one had been satisfactorily resolved at the pre-pre-trial conference, Your Honor, Plaintiffs' Exhibit No. 16.

THE COURT: What is it?

MR. GILDIN: Excerpts from a transcript of the hearing before the Department of Public Welfare. I'm not offering any findings of the hearing examiner; we're offering portions of the testimony of witnesses called by the Pennsylvania Department of Public Welfare.

THE COURT: What's your authority for taking this?

MR. GILDIN: Pardon?

THE COURT: What is the authority for admitting this?

MR. GILDIN: Your Honor, we believe these are admissions by the Pennsylvania Department of Public Welfare, and I think all would agree here that there was certainly no

objection lodged by the pre-pre-trial conference to these particularly excerpts that had been pointed out.

THE COURT: Well, I'd rather have heard from Mr. Cillo. This is, in fact, a deposition; isn't it?

MR. GILDIN: Your Honor, it's in essence sworn testimony, and it's an admission of a party; regardless of the hearsay native, it is definitely his out-of-court statement. [30] It's offered as admissions of a party.

The department called him as a witness, as their agent. In fact, these are the only two witnesses the department called. Rather than burden them—we could have subpoenaed them, Your Honor, but it doesn't appear necessary to bring them in here for the couple of lines of testimony, which were already elicited at that particular hearing.

THE COURT: Does this qualify as a disposition? That's what I'm trying to find out. Was there counsel for the Commonwealth in attendance at this hearing?

MR. GILDIN: There certainly was, Your Honor. The witness was called by counsel for the Department of Public Welfare.

THE COURT: Let's find out if there's an objection, first from the Commonwealth. Do you object to the use of this document?

MR. RESSLER: Your Honor, we do not object to the document per se. We do object to the characterization that these are admissions on the part of the department.

THE COURT: All right, I understand. I'm trying to find out first whether there's an objection to the document. Now, I take it that the Commonwealth doesn't have any. Do you have any objection to it, Mr. Hirt?

MR. HIRT: Well, yes, I do, because I did not understand at the pre-pre-trial conference that this was being [31] offered as an admission against the Department of Public Welfare. I'm not too sure if it's—I think it's a legal issue whether it fits within the hearsay exception in terms of whether Mr. Cillo can bind that agency.

The federal government, of course, was not a party to this proceeding, as I've indicated in the context of the earlier exhibit. So, certainly, I don't think it has any bearing upon the

department. We were not present as a party to that case, so it certainly does not bind us.

THE COURT: I understand. Well, I think the proper thing to do is to admit it as a deposition of an agent of the Commonwealth Defendants. It would seem to me that it ought to fall under the general rule relating to depositions of a party; and it's my recollection that the rule says that a deposition of a party may be used for any purpose; but let me see if we can find that.

MR. GILDIN: Your Honor, I believe we're at Federal Rule 32-A2.

THE COURT: 32-A2?

MR. GILDIN: That's correct, Your Honor.

THE COURT: The index to this is miserable, of course. 32-A2, yes, that's what I'm looking for.

The deposition of a party or of anyone, who at the time of taking the deposition, was an officer, director or managing agent or a person designated under so-and-so, another [32] rule, to testify on behalf of a public or private corporation, which is a party or governmental agency which is a party, may be used by an adverse party for any purpose.

That's the one I was looking for.

MR. RESSLER: Your Honor—

THE COURT: Yes, sir.

MR. RESSLER: —it's the position of the Commonwealth that the people who testified did not testify as agents of the Commonwealth but testified solely as to their personal knowledge with respect to the actions that were complained of in that hearing; in other words, the termination of the A.F.D.C. benefits.

THE COURT: Well, was this gentleman designated as a person designated to testify on behalf of the Commonwealth under 30-B6? Let's see what that is.

MR. RESSLER: Your Honor, certainly it was not specifically thought of because, of course, this particular—the context of this hearing was a state administrative hearing and, of course, the federal rules would not apply to that hearing. So, I'm sure that it was not an intentional reference to the rule; but our point is that essentially there's testimony of

two particular people in these pages, a Mr. Cillo and a Ms. Fisher.

THE COURT: Now, wait a minute. Let's see if we can keep this in some sort of focus for me to rule on. I'm [33] going to admit the document as a deposition of an agent of a party. Now, if there's some portions of this that you think should not be used, we'll get to that; but here is the situation and a good example of the situation where I think plaintiffs' counsel ought to state which part of the document he wishes to read, and I'll consider any objection to that particular part; and I'm not going to look at any part of this document which is not read in open court.

MR. RESSLER: I understand.

THE COURT: So, that will protect you, Mr. Ressler. Now, what parts or parts do you want the Court to read.

MR. GILDIN: Does Your Honor have the copies that I submitted up to the Court?

THE COURT: Yes.

MR. GILDIN: Again, Your Honor, we've already taken it down and I will only read portions. This is part of about a sixty-page transcript that was already agreed upon at the pre-trial conference.

The first portion begins with the question on the first page of Plaintiffs' Exhibit Sixteen.

THE COURT: Now, these are numbered at the top.

MR. GILDIN: Your Honor, they're numbered by the transcript pages; but we, in accordance with the Court's Order, have numbered them consecutively.

THE COURT: You need not have done that because I [34] thought the Court's Order said that if they were otherwise numbered—and sometimes we get an eight-digit number on a page—we can still use that.

Just so that there's no problem here, which page number are you going to use? Your own; is that right?

MR. GILDIN: Well, if the Court prefers the original—

THE COURT: I don't have any preference; but I'm thinking of some appellate judge trying to thread his way through this transcript, and he's going to have a lot of trouble with it.

MR. GILDIN: I'll use the pages that the court reporter inserted on this. Co-counsel and I have been kidding our-

selves about our overcompulsiveness throughout the proceedings.

On Page Four, there's a question asked—well, by means of background, Your Honor, Carmine Cillo was called by the Department of Public Welfare. He's a casework supervisor with the Pennsylvania Department of Public Welfare, again, a witness called by DPW, the Pennsylvania Department of Public Welfare, through it's counsel, Carol Genduso.

Her question on Page Four: "Thank you, Mr. Cillo. Could you please tell us the Department's policy concerning the use of a Social Security number; that is, can you explain in your own words why a Social Security number is required, based [35] upon the Department's policy?"

Now, Mr. Cillo's answer, the portion I'd like to read, is over on Page Five, the second full paragraph, beginning with the word "now."

That reads: "Now ..." and this is Mr. Cillo responding "... it is the system within our society today that it's a base for a means of control, and it's applied throughout our entire system—our society today, rather—without malice or prejudice. By that, I mean it doesn't say to any specific race, nationality or religion, you must acquire a Social Security number or must not. It speaks for everybody. And it is basically used as a convenient system of control and identification, because that number received by that individual will be used only by that individual and nobody else."

Page Six, Ms. Genduso asked another question, the first question she asks: "Mr. Cillo, can I interrupt you at this point, please.

"What I would just like to ask you directly is is it used by the Department to prevent fraud?"

And Mr. Cillo answered: "Well, [illegible]ally, yes, it is."

THE COURT: Who was Miss G[illegible]so?

MR. GILDIN: She was the Attorney for the Commonwealth.

THE COURT: All right.

[36] MR. GILDIN: Then, her next question: "Thank you. Also, I have one other question: It is used by avoid confusion; that is, is it used to specifically identify a particular individual?"

And Mr. Cillo's response: "Yes, it's used for identification and control."

Over on Page Seven, still with respect to Mr. Cillo. Now, my cross examination, the court reporter has designated—

THE COURT: I don't have ary Page Seven.

MR. GILDIN: Page Eight, I'm sorry, Your Honor. On my cross examination, I'm referred to on that transcript as "Mr. Gilben"; but the court reporter took it off a tape recording, so we have no quibble with that.

My question: "It's my understanding, sir, that you did not treat Mr. Roy any differently than other applicants—than any other applicant, right? You stated that this applies system-wide, and so you treated him as any other applicant?"

And Mr. Cillo responds: "I don't—I am not Mr. Roy's caseworker, but all my workers who work with clients, if they would have the same question as Mr. Roy, absolutely."

My next question to Mr. Cillo: "And he was ineligible solely because of the regulations requiring a Social Security number?"

[37] And Mr. Cillo's answer: "If you were to read his notice, that was the sold . . ." That's what the reporter has there. I believe that it's "sole." ". . . reason for the denial of assistance."

Then, the next question I asked him: "Under the regulations, am I correct, that when Mr. Roy is applying for benefits on behalf of Little Bird of the Snow, he will in every case have to provide his own Social Security number as well; is that correct?"

Mr. Cillo's answer: "Yes, for his own benefit."

My next question: "But when he applied for the cash grant and Medical Assistance for Little Bird of the Snow, you also required his Social Security number on the application?" I'm reading over on Page Nine.

Mr. Cillo's answer: "Yes. He's the head of the household, absolutely."

That's the only portion of Mr. Cillo's testimony that we've offered into evidence. The second and only other witness called by the department was a Ms. Alberta Fisher, an income maintenance worker for the Pennsylvania Department

of Public Welfare. Her testimony is on Page 12, which is the last page of the packet that I've handed up for Plaintiffs' Exhibit No. 16.

On cross examination, my question to her "Miss Fisher, you were the caseworker. You didn't treat Mr. Loy any [38] different than any other applicant, did you?"

And her answer: "Absolutely not."

And the next question: "And you agree that he was ineligible solely because of his absence of a Social Security number, as all sides have agreed?"

And Miss Fisher's answer: "That's the only reason."

Your Honor, that concludes what we have with respect to Plaintiffs' Exhibit Sixteen.

THE COURT: Now, are there any portions of Plaintiffs' Exhibit Sixteen that any defense counsel wants this Court to consider? I'm perfectly willing to do that as well.

MR. RESSLER: If we could have one moment, Your Honor.

THE COURT: Or you could do it on your side of the case. That will save a little time.

MR. RESSLER: Very well.

MR. GILDIN: Your Honor, we have no further evidence to offer. We would like, before resting, however, to check our understanding of the status of the exhibits with the Court.

THE COURT: Wait until I get my list. My list of exhibits—and I keep it because the deputy clerks are so busy that we cannot have one in the court room; and consequently, because I'm doing a lot of things, keeping minute sheets and [39] exhibit lists and the listing of the witnesses and making notes, sometimes it's very easy for me to make an error.

I show that the following were admitted: P-1 through P-9. I also show that P-14 and P-19 were excluded. Are there some that I've missed?

MR. GILDIN: Plaintiffs' Sixteen was read in, which is just what we went through. I don't know if Your Honor characterizes that as being admitted.

THE COURT: I'll show that as being admitted as well.

MR. GILDIN: Our records would indicate that Plaintiffs' Nineteen, which was the picture of Tsonakwa, was excluded.

THE COURT: Right, I did say that.

MR. GILDIN: Your Honor, at this point, it is our understanding with respect to the issues in this case that our burden was with respect to providing the belief as religious and sincere; that the burden then shifts to the defendants to determine whether their interest is compelling, and whether there is a less restrictive alternative. We, of course, reserve the right to present witnesses on rebuttal with respect to those issues; but insofar as we have any evidence with respect to Mr. Roy's beliefs as being religious and sincerely held and the fact that there's an infringement upon those beliefs, we rest our case.

[40] THE COURT: Now, who wishes to go forward?

MR. HIKT: Your Honor, before presenting witnesses, I would like to for the record move, pursuant to Rule 41, to dismiss.

Basically, the testimony by Mr. Roy, I do not believe, demonstrates a sincerely held religious belief in terms of his objections to the Social Security number. Of course, it's a matter of credibility for the Court; but I think that in terms of Mr. Roy's testimony and how we tried to isolate his objections, I do not think they can be traced to a specific Abenaki religious belief.

I think there are inconsistencies in his testimony concerning the use of numbers, concerning what he construes to be the evil of Social Security numbers, and inconsistencies in terms of his family's religious beliefs. I would note in this context, for instance, that with respect to Karen Miller, there's been no testimony as to her religious beliefs, that indeed they're in any way affiliated with the plaintiff's. In fact, there's evidence that she allowed photographs to be taken of their child; and that Renee, the eldest daughter, has a Social Security number which was procured voluntarily by the mother.

I would say, therefore, these are strong indicia that the plaintiffs have not presented a bona fide, sincerely held religious belief; and I do not believe that Professor [41] Drinnon's testimony can lend weight to that. I know that Your Honor has admitted his testimony, but we still have the continuing objection that he is not a religious studies

professor or theologian; and he admitted that there is great diversity among Indian tribes in terms of native American beliefs and also indicated that he does not know whether other Indians share the objections to the Social Security number requirement; and he obviously has not gone to the Abenaki reservation and indeed knows no other Abenakis.

I would say in particular that Karen Miller should be dismissed as a party plaintiff. Again, there was no testimony by her or about her indicating that she shares these religious beliefs. She did not testify, although she was placed on plaintiffs' list of witnesses. I think that, at the very least, she should be dismissed as a party plaintiff; but I would ask that the Court dismiss the action in its entirety because I do not believe that the religious belief has been show.

The second I would make, Your Honor, is that I do not believe that, based upon Mr. Roy's own testimony, that one can fairly say that there is any alternative to the system to which he objects; because if I understood his testimony, his objection is not only to the unique numerical identifier, it is to one facet of what he called the great evil, which includes computerization; and obviously, the plaintiffs I think have [42] conceded that a computer is part of these programs. I do not see how Mr. Roy's objection could be served by any alternative under the Social Security system, with or without a unique numerical identifier.

MR. RESSLER: Your Honor, on behalf of Defendant Cohen, we join in the arguments raised by Mr. Hirt, and we would not reiterate them.

THE COURT: What about you, Ms. Allaben?

MS. ALLABEN: I have nothing to say, Your Honor.

THE COURT: Do you join in this motion?

MS. ALLABEN: Yes. Mr. Hirt also represents my client.

MR. HIRT: Yes, Your Honor. Just for clarification, Miss Allaben is counsel for the Department of Agriculture, as well as myself. I have two hats; I speak for both of them.

THE COURT: I see. I wasn't aware of that. I thought she was the one who was here on behalf of Mr. Block.

MR. HIRT: Well, she is as well. She is my co-counsel, in essence.

THE COURT: Okay. Now, what do you want to respond to that?

MR. GILDIN: Well, Your Honor, even before we get into the improper factual inferences that I think Mr. Hirt draws, he obviously is unfamiliar with the legal standards as to whether this belief is religious, which I think has infected the [43] trial to date.

It's not even necessary that Mr. Roy's belief be part of any particular sect, and the Supreme Court has made that quite clear and the Third Circuit made that quite clear in Lewis versus Califono at 16 F.2d 73 at Page 81, where the Court said: The decisions of the Supreme Court of the United States adopt the view that an individual's sincere religious belief, which is not a tenet of a sect is a belief protected by the First Amendment.

THE COURT: What case did you cite? You just cited a case.

MR. GILDIN: Right. I'm reading from our pre-trial memo, Page 7.

THE COURT: What's the case?

MR. GILDIN: Well, the first case I—

THE COURT: I thought you referred to a Pennsylvania Supreme Court case.

MR. GILDIN: United States Supreme Court, Your Honor, United States versus Ballard.

THE COURT: That's good enough. What is your view about whether this action should be dismissed as against Plaintiff Miller?

MR. GILDIN: Your Honor, I don't think that there's any basis for dismissing it against Ms. Miller. He's here on behalf of the family; Mr. Roy has testified on behalf of the [44] family here with respect to the beliefs—

THE COURT: What did he say about his wife's religious belief?

MR. GILDIN: As to her religious beliefs themselves?

THE COURT: Well, I mean as to the use of the Social Security number and the declination to apply for it. Did he say that her reasons for not applying for the Social Security number were parallel to his?

MR. GILDIN: I believe so, Your Honor.

MR. MILES: Your Honor, if I might, I believe that Mr. Roy testified, under questioning by Mr. Hirt about when they were going to talk to Little Bird of the Snow and so forth, and then he questioned whether he discussed it with

his wife, and I believe Mr. Roy testified that they had discussed it, that they agreed that she shouldn't have a Social Security number now, that she should make that decision for herself, and that a time would come when she would make that decision; so they shared those beliefs.

THE COURT: I'm questioning whether there's any testimony that Karen Miller is opposed to the issuance of a Social Security number to this little girl or whether she's opposed to the application for it on religious grounds. Is there any such testimony?

MR. MILES: I think that's what I was trying to encapsulize, Your Honor.

[45] THE COURT: You were talking about when they were going to talk to her about it.

MR. MILES: Well, Your Honor, my point is that they had talked about the fact that she shares Mr. Roy's beliefs in why Little Bird shouldn't have the number now; and as part of that sharing of the belief is also the sharing that it is a decision for Little Bird to make, and I think that's evidence that she does in fact share the religious beliefs of Mr. Roy.

THE COURT: All right. Well, I'm going to deny the motion to dismiss as against the Plaintiff Roy. I'd like to hear a little more about whether or not the motion has any merit against the wife; and I'd also like to hear whether or not, if this case were dismissed against the wife, what effect that would have on Mr. Roy's own position and the position of Little Bird of the Snow. Does one of you want to—

MR. GILDIN: Your Honor, the fear is that if, in fact, this action is dismissed against Ms. Miller, the government, even if Your Honor should find in our favor in this case, will say: Well, we continue to deny you benefits because now your wife would have to come forth and make the decision as to whether or not to provide the number.

We'll go in a big circle, Your Honor, because this decision was, in fact, made on behalf of the family, as the evidence has shown here; and our fear is that the government is now going to start taking the position, regardless of what's [46] ordered here, that: Well, there is another possibility. You don't just make this decision, Mr. Roy. Your wife can decide whether or not to submit that particular number.

It's quite clear that the decision is, in essence, on behalf of the daughter. The Supreme Court has stated on many occa-

sions that parents certainly have the right to make these decisions to protect the welfare of their children; and for those particular reasons, as well as the testimony that Mr. Miles referred to there, I don't see where it's appropriate to dismiss Ms. Miller.

I'm not sure that it has any consequences with respect to the relief in this lawsuit. I am concerned with what the government's position might be taken if, in fact, we prevail in this action and we have to go another round on a new ground not previously raised.

MR. MILES: Your Honor, may I add to that and may I direct the Court's attention to No. 61 of the comprehensive statement of undisputed facts which reads in its entirety: "Mr. Roy and Ms. Miller continue to refuse to provide a Social Security number for Little Bird of the Snow because they claim it would violate their religious beliefs." That's an undisputed fact, Your Honor. I further think there's an inference to be drawn, obviously, from—

THE COURT: Well, with an undisputed fact like that, I don't think there's any problem at all there, and that [47] has an effect on my view. So, we'll deny the motion on behalf of the government and the commonwealth to dismiss this case—

MR. MILES: Thank you, Your Honor

THE COURT: —at the conclusion of the plaintiffs' evidence.

Now, are you going to have evidence, sir?

MR. HIRT: Yes, Your Honor.

THE COURT: Well, it's 11:09, and this would be an appropriate point, I believe, to take our morning recess. We'll take ten minutes.

MR. MILES: Thank you, Your Honor.

(Recess taken from 11:09 until 11:19 a.m.)

* * * * *

[52] MR. HIRT: I'd like to call my first witness to [53] the stand, Your Honor.

ROBERT G. STAUFFER,

having been called as a witness on behalf of the defendants, being first duly sworn according to law, testified as follows:

EXAMINATION

BY THE COURT:

Q. What is your name, please?

A. Robert Stauffer.

Q. S-t-a-u-f-f-e-r?

A. Yes, sir.

Q. Do you use a middle initial?

A. "G."

Q. As in George?

A. Yes.

Q. Would you tell us in what community you reside?

A. In Philadelphia, Pennsylvania.

Q. What is your occupation?

A. Regional computer specialist.

Q. For whom?

A. The Office of Family Assistance within the Social Security Administration.

THE COURT: All right. You may go ahead, counsel.

[54] **DIRECT EXAMINATION**

BY MR. HIRT:

Q. Mr. Stauffer, how long have you worked for the Social Security Administration?

A. Since 1978.

Q. Briefly, before going into your positions at the agency, what is your educational background?

A. I have a bachelor of science in accounting from La Salle College and I am approximately half-way through an MBA at Temple University.

Q. What is the MBA in?

A. Business administration.

Q. Have you received any technical training while at the Social Security Administration?

A. I have received technical training on the current job and in the line of contracting and some state-of-the-art telecommunications type of activities; and in my previous employment as a programmer analyst for the Department of the Navy, I received extensive training in IBM and Sperry Univac data processing.

Q. Prior to your current position, what prior positions have you held at Social Security Administration?

A. At the Social Security Administration, I haven't held any prior positions. I worked for the Health Care Financing Administration for two years prior to working for the Social [55] Security Administration in a similar capacity at a junior type position.

Q. Is the Health Care Financing Administration part of the Department of Health and Human Services?

A. Yes, it is. It oversees the Medicade Program.

Q. The Social Security Administration, as I understand it, is also part of the Department of Health and Human Services.

A. Yes.

Q. Okay, fine. You said while you were at the Health Care Financing Administration you had similar responsibilities. What were those?

A. To monitor the systems development activity to support the Medical Assistance Program in the Philadelphia regional office, which includes six states.

Q. What do you mean by systems development activities?

A. Systems development activities in the Medicade Program, at the time there was an inventive federal financial participation for the states to develop a system to support medical claims processing; and there was a series of requirements the state would have to meet to receive this incentive funding. Basically, we were to provide approval for that funding—or recommend approval, rather—and then monitor the development to completion.

Q. Prior to your position at Health Care Financing Administration, what job did you hold?

[56] A. Well, briefly, there was a—I started working for the department, which at the time was the Department of Health, Education and Welfare in 1976, and at that time, there wasn't either HCFA nor Social Security Office of Family Assistance within the Social Security Administration existant. It was another agency altogether called SRS, which is Social and Rehabilitative Services, which really covered the Aid to Families with Dependent Children Program, the Medical Assistance Program, the social service programs, including programs such as Vocational Rehabilitation.

When President Carter was elected in the Fall of 1976 and in early 1977, that program—that organization was abolished, and the Medicare Program from Social Security Administration along with the Medicade Program from the SRS Program combined to the Health Care Financing Administration.

The Social Services Program formed a new agency called the Office of Human Development; and the Office of Family Assistance, which covered the Aid to Families with Dependent Children Program, was brought under the Social Security Administration, basically under the theory that they would put all health type programs in one agency and all payment type programs in another agency. Hence, the Office of Family Assistance being a cash type grant was made part of the Social Security Administration.

THE COURT: Just a second. Go back to the very [57] beginning of that answer. There was one word or several small words that I couldn't catch. It might have even some letters.

(The preceding answer was read back in part by the reporter.)

THE COURT: There wasn't a what?

MR. HIRT: HCFA, it's an acronym.

THE COURT: I'm going to strike that answer. Now, I can't put up with this nonsense.

MR. HIRT: Your Honor, I will assure you that I will not ask any questions with—

THE COURT: Well, I'm not going to have any witness give me any of it either. I've had enough of this kind of stuff.

MR. HIRT: Your Honor, I will do my best to assure that that does not become a problem. I'm sorry.

THE COURT: Now, you see what it does. I couldn't figure out what he was saying. So, he gave a very long answer, and then the court reporter had great difficulty following or finding the start of the answer, and then she gets down to it, and now we find there's an acronym involved and it didn't mean anything to me.

Now, I cautioned the witnesses yesterday, I thought, about this, and you get it every time you have somebody with expertise in a minute phase of governmental operations; and it [58] has got to stop in this court. Go ahead.

MR. HIRT: Fine, Your Honor.

BY MR. HIRT:

Q. What were your responsibilities at the Social and Rehabilitative Services agency?

A. At the Social and Rehabilitative Services agency I was a computer specialist also there, with responsibilities of monitoring systems development activities in Region Three, which includes six states: Virginia, West Virginia, the District of Columbia, Delaware and Pennsylvania.

Q. As I understand it, your current title is also regional computer specialist.

A. Yes, sir.

Q. Does your job involve work in the same region that you identified?

A. Yes, sir.

Q. What type of responsibilities do you have as regional computer specialist?

A. I basically have responsibilities to monitor systems development activities to support the Aid to Families with Dependent Children program.

Q. Who do you work with in that capacity?

A. I work at varying levels of state government involvement. It depends upon where the organization for the project management is taking place.

[59] Q. Can you give us an example, taking one of the six states from this region, and give us an example of who you would work with?

A. Certainly. The project management in the Commonwealth of Pennsylvania, Department of Public Welfare, for the development of this type of system is with the Deputy Secretary for Income Maintenance, which income maintenance includes AFDC, Medical Assistance and food stamps eligibility.

Q. In terms of this development system, is this a requirement that a state have such a system in place?

A. In order to receive incentive or increased federal financial participation at the 90 percent level, there was a law passed to receive this funding, Public Law 96265; and to receive this additional funding, states must meet certain federal requirements, systems requirements.

Q. What are those system requirements?

A. The systems requirements include an intake processing, intake being when a client would walk in and apply for help, Aid to Families with Dependent Children. It includes the eligibility determination process, the process where a client would be determined whether they were eligible for the program or not. It includes a calculation of the grant. It includes a third party verification module, which includes matching with the beneficiary records of the Social Security Administration, which includes Social Security earnings files, railroad [60] retirement files, black lung files, supplemental security income files.

It also includes state verification files, and they are including state income tax, vital statistics, motor vehicles.

Q. Are there any other elements to this system beyond those?

A. Yes, there's other elements to the system. There's a quality control function, which monitors the quality of the information being maintained on the state file. There's an issuance or financial subsystems, which include—which monitor the issuance of the warrants of the checks, reconciliation back from the banks.

There's also an interface with the child support, Title IV-D Program, and there's also an interface—

THE COURT: Now, I haven't any idea what that is.

MR. HIRT: I'm sorry, Your Honor.

BY MR. HIRT:

Q. Let me interrupt you, Mr. Stauffer. Can you identify for us what program you used referred to by the term "Title IV-D"?

A. Okay. I have a tendency, Your Honor, to—this child support program, which is also known as the Title IV-D program, such as the Aid to Families with Dependent Children Program is the Title IV-A program. It would probably be better if I would just leave out the title altogether. Is that causing [61] confusion?

THE COURT: Well, it's meaningless to me.

THE WITNESS: Yes, sir, I understand. It's the child support enforcement program.

BY MR. HIRT:

Q. What does that program do, just for our benefit?

A. That insures that the absent parents are providing support to their children, and it monitors that process.

Q. Are there any other elements to the system than those you've just stated?

A. Yes. The one other element is the work registration interface to insure that the requirement for registering for work is monitored.

Q. Before we discuss some of these in more detail, what is the so-called 90 percent requirement that you talked about? What does that mean in terms of a relationship between the state and federal government?

A. That means that the federal government will pay 90 percent of the federal—of the funds paid to design the system, to develop the system and to implement the system statewide.

Q. You mentioned the verification of this system. Can you describe in more detail what the components are of the verification aspect?

A. Yes, sir. The components of that are the—as [62] part of the application and the eligibility determination process, there is a verification to determine whether the applicant is receiving earnings through the Bureau of Employment Security, which is an additional state agency. There's a requirement to do a match against that file.

Q. For our benefit, what is a bureau of employment security?

A. That maintains the wages and unemployment compensation across the Commonwealth of Pennsylvania for everyone that is working in the commonwealth.

Q. What is the purpose, at this eligibility determination, to match against the Bureau of Employment Security file?

A. To determine whether the client has worked or received wages over the past period of time, whatever it might be, the past quarter, depending upon how often the match is run, or unemployment compensation.

Q. In terms of the other verification efforts you mentioned, you distinguished between federal and state. Can you describe the federal verifications for us?

A. Okay. As far as the state, that was just one example of the state. I can give you an example of the federal. The federal requirements would be basically matching with the

Social Security Administraton files to determine whether the person receiving it is receiving benefits from any type of Social Security benefits, whether they be railroad retirement, [63] black lung, old age type of benefits. In other words, if they're on retirement.

Q. Let me interrupt you to have you go back to each one of those. The first one you mentioned was old age.

A. Yes.

Q. Now, what is the file at Social Security Administration that you're referring to? What type of benefits are at issue?

A. It's basically that the person may be retired or they may be someone that is receiving some type of disability from the Social Security Administration, those types of things.

Q. What about the railroad retirement?

A. That's someone that may be receiving railroad retirement, somebody that's actually receiving that type of benefit.

Q. Can you give some more examples of the state verification beyond the Bureau of Employment Security files?

A. Yes, I can give you that. There's a verification with the motor vehicles file, and there's also a verification with the vital statistics type file.

Can I ask a question for clarification, or am I out of order on that? I guess what I'm saying is: Are we talking about just about the commonwealth?

THE COURT: I think what you ought to do, counsel, is ask him a question, and if he doesn't understand it, you can [64] say you don't understand it and get it, in the ordinary framework, ironed out.

MR. HIRT: Fine, Your Honor.

BY MR. HIRT:

Q. Mr. Stauffer, in terms of the verification elements that you've described, are each one of these types of verifications used in each one of the states that comprise this region, the six-state region, or do they vary?

A. They vary, and it varies depending upon availability and sometimes organizational type of involvement.

Q. What do you mean by "organization type of involvement"?

A. For example, in the State of Maryland and in the State of Virginia, the eligibility requirements for the Aid to Families with Dependent Children and the Medical Assistance program lie in different state departments. Okay?

Q. In other words, two different departments administer those benefit programs.

A. Yeah.

Q. They're not within the same executive cabinet.

A. Yes, sir. In contrast to Pennsylvania, where the Department of Public Welfare administers the Aid to Families with Dependent Children and the Medical Assistance program.

Q. Now, I think the other term you used was "availability." What do you mean by that?

[65] A. For example, we have a requirement that the state should pursue matching with files such as state income tax and motor vehicles. For example, if the state income tax file is not in an automated fashion where they could do a particular match, then we would not require that match; or motor vehicles is another example, where in the Commonwealth of Virginia, I believe, the Social Security number is carried on the motor vehicle file and yet it is not carried in the file, say, in a different state.

Q. By a file in a different state, are you saying that Virginia has a system under which Social Security numbers are part of the motor vehicle system but that may not be the case in the Pennsylvania motor vehicle system?

A. Yes.

MR. GILDIN: I object to that question as leading, Your Honor.

THE COURT: All right. What is your view, counsel?

MR. HIRT: I don't think it's leading. I'm trying to clarify what he means by variety to distinguish among these different states.

THE COURT: I think it's clearly leading, and I'll sustain the objection. You may pursue the subject in another way.

BY MR. HIRT:

Q. Mr. Stauffer, when you talk about a motor vehicle [66] system, how are they arranged?

A. They may be arranged by a serial number or a vehicle registration number, or they could be arranged by a number such as a Social Security number.

Q. In terms of the six states within this region, do you know which states have motor vehicle systems that are arranged by Social Security number or by vehicle registration?

A. To my knowledge, Virginia is the only one that has one by Social Security number.

Q. You mentioned income tax, state income tax files. How are those arranged within the state governments?

A. I would believe that—in fact, at this time, I would believe certainly that the Commonwealth of Pennsylvania and any state that has a state income tax has the Social Security number as part of that.

MR. GILDIN: I would object, Your Honor, and move to strike. If the witness knows, that's one thing; if he's speculating by saying "I believe," I'd object to that as not within the personal knowledge of this witness.

MR. HIRT: I think he said he believes. Let me inquire into the basis for his belief.

THE COURT: I'll sustain the objection at this point.

BY MR. HIRT:

Q. Do you have any knowledge as to how state income [67] files are organized?

A. In the Commonwealth of Pennsylvania, the Social Security number is maintained on the file. I mean, I know that from being a state resident, and actually the fact that the Social Security number is part of the state income tax file.

Q. You also mentioned departments of vital statistics. Within the six state region, do you know how those files are maintained?

A. I would guess, sir, that the—I'm sorry.

Q. Well, I want to ask you the basis for your knowledge. I want to ask you what your knowledge is so I can be clear.

A. Okay. I don't really know, beyond the—I don't know the answer to that.

Q. In terms of the developement of state systems, what is your role, if any, in terms of their monitoring? Is that part of your job, in other words?

A. Yes. I monitor to insure that the—as the system is being developed, that it will ultimately meet the requirements of the system.

Q. And in terms of—if I can use Pennsylvania—what do you do in Pennsylvania in terms of dealing with that state?

A. In Pennsylvania, they're in the middle, somewhere in the middle of the systems development activity to meet these [68] requirements. I attend state meetings approximately twice a month, where they provide the status of the system; and I also participate and perform reviews, annual type financial reviews, where we determine whether the system is meeting the requirements as it's being implemented in order to determine if the system is on the right track.

Q. Do you know what the cost of the Pennsylvania system is to develop?

Q. The cost to date has been approximately $15 million. We have just received a second request for an additional $35 million to complete the system.

Q. Do you know what Pennsylvania plans to do in developing this system? What are its objectives, in other words?

A. Its objectives are to meet the requirements of the law and to do all the types of verifications and the financial kinds of reporting that are required to meet the requirements of law.

Q. In terms of what you've called the matching efforts, do Social Security numbers play any role in those efforts?

A. Social Security numbers, yes, they do.

Q. What is that role?

A. Social Security numbers are the key part of the third party verification part of the system.

Q. Okay, let me stop you there. What do you mean by "the third party verification system"?

[69] A. Third party verification. I'm really talking about anything outside of the AFDC eligibility determination—or Aid to Families with Dependent Children eligibility system.

Q. And by "anything outside," what do you mean by that?

A. Other state agencies. It could be, again, we mentioned the wage information, motor vehicles information, vital statistics information, state income tax, and also, if appropriate, the medical assistance type information.

Q. Why do you call it third party verification?

A. Because it's out of the general line of eligibility determination for Aid to Families with Dependent Children. Under the state mandates to have these kinds of eligibility determinations made within a 15-day period, many times it's not practicable to be able to do these types of matches within that time frame.

Q. You've stated there's a 15-day time period.

A. Yes.

Q. What does that mean?

A. That means that from the time that the application is taken, they would have to have the—the grant would have to be released.

Q. By "the grant would have to be released," what do you mean by that?

A. That it would have to be mailed to the applicant [70] or the client.

Q. Do you know what matching is done in that 15-day period?

A. Basically, they do the internal type matching to determine whether the client is receiving Aid to Families with Department Children anywhere else in the commonwealth.

Q. The Commonwealth of Pennsylvania?

A. Yes.

Q. How do they perform that matching activity?

A. Through a data processing screen or—

THE COURT: I missed the last. Through a data processing what?

THE WITNESS: Screen, sir.

THE COURT: Screen, I understand what a screen is.

MR. HIRT: You understand what a screen is?

THE COURT: Yes.

MR. HIRT: Okay, fine, Your Honor.

BY MR. HIRT:

Q. Does the Social Security number have any role in that effort?

A. Yes, it is part of the screening process.

Q. Can you describe that in more detail?

A. Basically what happens is that whatever information is available at the time that the application is taken, they feed that information into the computer to determine whether [71] there's any match or something close to a match anywhere else in the Commonwealth of Pennsylvania.

Q. In the situation involving the 15-day period, what organization is matching with what other organization, so I can be clear on that?

A. Basically, they're—during that 15-day period, they're just determining whether they're receiving Aid to Families with Dependent Children anywhere else in the state.

Q. Going beyond the 15-day period match, what type of matching activities are performed beyond that time period?

A. Many matches are periodic matches; and by periodic, I mean that they are quarterly, they are semi-annual, or they are monthly; and depending upon when the application would come in, they would fall into that next scheduled type of match.

Q. What are the purposes of conducting these matches?

A. Basically, it's to maintain the credibility and the integrity of the file to insure that errors don't get onto the file.

Q. What do you mean by the credibility and integrity of the file? Can you describe what you mean by that?

A. What happens is that many times the applicant doesn't really know what types of information we've asking for or the commonwealth is asking for when they're speaking of earned or unearned income; and unless we ask a specific question at application, we may not get the correct information.

[72] Q. What information do you receive through the match potentially?

A. For example, in the Social Security match, we would receive that the person is receiving retirement benefits.

Q. Now, is the purpose of these matches exclusively to prevent fraud by individuals?

A. No, it isn't.

Q. What are the other purposes?

A. It could be that it's a corrective action type—it could be for a corrective action type thing, which is basically to keep the data base free of errors; and also, it could be a type of thing where you want to find out something to alert another program of a particular issue.

Q. I don't think I understood your last remark. I didn't catch your last—

A. Maybe I can provide an example. The best one I can think of is the medical assistance program has some screening type activities that have to take place every six months or so; and currently, in the Commonwealth of Pennsylvania, the AFDC and the medical assistance file—the Aid to Families with Dependent Children and the medical assistance file would be matched to determine whether the children on the Aid to Families with Dependent Children case have—there's been a medical assistance claim over the last, say, two years; and basically, that is to determine whether they are receiving their proper [73] screening. It could be used for many things. It's called a missing children's match.

THE COURT: Whether they were receiving their proper what?

THE WITNESS: Proper medical screening for preventive purposes.

BY MR. HIRT:

Q. What files are being matched to discover this information?

A. It's a medical assistance claims history file, which processes—which maintains a history of all the claims that have been paid by the commonwealth over the last several years against the Aid to Families With Dependent Children and medical assistance eligibility file.

Q. Now, are all the files that you've talked about thus far computerized?

A. Yes.

Q. Is the Social Security number used in, for instance, the missing children file?

A. Yes.

Q. What is the purpose in using the Social Security number?

A. To determine whether there's cases that have—claims for that particular child in the past two years. It's actually the ultimate for the matching criteria.

[74] Q. Whose Social Security numbers are being matched?

A. That would be the recipient or the actual individual within the case.

THE COURT: The child?

THE WITNESS: The child.

BY MR. HIRT:

Q. Do you know whether states are required to reduce error rates in their Aid to Families with Dependent Children programs?

A. Yes, certainly. There is a law currently that's being implemented right now that they must have their error rate down by September of 1983. The reason that that's back in—it's already past September of 1983—the findings, the quality control findings of those errors have not been finalized; but basically, they must have their error rate down to four percent by that period of time and then follow it up the following year down to three percent.

Otherwise, they're subject to fiscal sanctions, and they would lose money based on how many points they are above the percentage.

Q. Who would impose these fiscal sanctions?

A. Well, the Aid to Families with Dependent Children, the Office of Family Assistance would impose these sanctions for our program. There's other sanctions for other programs that I'm not familiar with.

[75] Q. Are you familiar with the requirement that participants in the Aid to Families with Dependent Children program provide Social Security numbers for each of the individuals in the family?

A. Yes.

Q. What is the purpose of that requirement?

A. The purpose of that requirement is basically for identification and to—

Q. I'm sorry, I don't mean to interrupt you. Are you finished?

A. Yes.

Q. Who is the federal government, if I can use that term, trying to identify?

A. They're trying to identify all people within that case.

Q. By "case," what do you mean by that? That's a term of art perhaps. What do you mean by "case"?

A. Okay. All individuals that are impacted by the case, including the parents and children.

Q. Is the term "household" a possible synonym for "case"?

MR. GILDIN: I object, Your Honor. He's now clearly putting words in the witness' mouth. It's clearly a leading question.

THE COURT: What's your view?

[76] MR. HIRT: Well, Your Honor, I concede that it's leading, but I'm trying to clarify a technical term.

THE COURT: All right. I'll sustain the objection.

BY MR. HIRT:

Q. Why, Mr. Stauffer, must each family member be identified as opposed to the parents?

A. Because of the data matched, the third party matches that I referred to earlier.

Q. Can you give me an example where the Social Security number of a child would be involved in one of these matches?

A. It would be a match in the medical assistance match that I referred to earlier, and it also may be a match when we are trying to match across state lines, where someone may be on a case in Philadelphia to insure that they would not be, for example, in a case in Camden, New Jersey; and since they do not have similar numbering systems other than the Social Security number, that's the requirement to have the Social Security number.

THE COURT: Counsel, it's now slightly after noon. I don't want to hurry you, but I think you ought to pick a convenient place between now and 12:30 for us to have our luncheon recess.

MR. HIRT: Okay. Let me go a few more minutes and see if I can—

[77] THE COURT: Go as long as you like.

BY MR. HIRT:

Q. You just mentioned, Mr. Stauffer, the across state lines example. Now, what is the purpose of a match across state lines in that instance?

A. It could be one of two reasons. One is to determine whether someone is receiving Aid to Families with Dependent Children across at each jurisdiction. The second reason is to determine whether a person may be receiving Aid to Families with Dependent Children in one jurisdiction, such as Philadelphia, and may be employed in the other jurisdiction; namely, Camden New Jersey, as in the example.

Q. How is the Social Security number related to discovering whether either of these fact situations is, in fact, the case?

A. It actually is the vehicle used to match. In other words, it's the only unique character or set of characters or data on each file that is maintained, the common denominator.

THE COURT: Is it possible for a person to have two different Social Security numbers?

THE WITNESS: I can't really address that as far as the Social Security Administration is concerned. I can talk about the Commonwealth of Pennsylvania system doesn't allow duplicate Social Security numbers on a file.

THE COURT: All right. We'll wait with that [78] question for another witness.

MR. HIRT: Well, I might want to follow this up, if it's proper.

THE COURT: Go ahead.

BY MR. HIRT:

Q. Mr. Stauffer, you just said that the State of Pennsylvania, if I understood your testimony, does not accept duplicate numbers. Is that what you're trying to say?

A. That's correct. The system doesn't allow duplicate numbers to be added to the system, so that either it's an error or it's someone that's already receiving assistance, they could not allow that record to be added to the file.

Q. Coming back to the receipt of benefits in the two jurisdictions, with respect to the first example, someone receiving Aid to Families with Dependent Children benefits

in Philadelphia and receiving the benefits in Camden, New Jersey, what is the purpose of having a Social Security number identified to each individual in that household? By that, I mean not just the parents.

A. Basically, it's the common denominator. It's one to insure that the child is not on the case or within the household in both jurisdictions.

Q. What type of situation might arise where that may be the case?

A. Well, I would assume that if a party was living [79] in, say, Philadelphia and that they split up for some reason, where the mother and the child would go to New Jersey and the remaining parent, the father and, say, a second child would remain in, say, Philadelphia, and there's a possibility that they could share—there's a possibility that they could apply for assistance, Aid to Families with Dependent Children, in both jurisdictions; and without doing that type of match by Social Security, you wouldn't have any way of knowing that.

Q. What would be the missing information that you wouldn't know without the Social Security number for each individual?

A. You wouldn't have any idea whether there was—you know, without the Social Security number, you're not going to be able to determine whether they have—if it won't come up as a match, there's just no match.

Q. When you use the term "they won't come up as a match," what type of process are you describing?

A. An automated process or an actual computer match between the two jurisdictions.

Q. How is that match effort performed, without getting into too much technical jargon, but if you could do it for a layman like myself?

A. The Commonwealth of Pennsylvania will have an agreement with the State of New Jersey to exchange files and to do a computer match, and the Commonwealth of Pennsylvania [80] will provide information. They will provide the Social Security number, the individual Social Security number to the State of New Jersey, who will match against their welfare file and come up with prospective

matches or hits, and then the Commonwealth of Pennsylvania will follow up to determine whether there's a possibility that there's someone on the —receiving Aid to Families with Dependent Children in Pennsylvania—I mean in New Jersey in addition to the Pennsylvania one.

Q. You've used the term "exchange files." What do you mean by that?

In other words, for my question to be clear: Is there a physical exchange of files between these two entities?

MR. GILDIN: I object, Your Honor. The proper question was the first one: What do you mean by exchange files? After that, it became leading.

MR. HIRT: I disagree that it's leading, but I'll ask the first question again.

THE WITNESS: It's an actual physical exchange. I mean, they actually—the information, depending upon how the information is stored. There are various ways that computers store information. It may be a tape, such as a tape that—a recording tape, or it may be something called a disc file, which really allows much more as far as volume is concerned.

So, they would actually exchange information [81] physically, either by mail, or they would actually maybe meet and go over the procedures as far as the exchange is concerned and what they're going to do with the results.

BY MR. HIRT:

Q. In terms of the Region Three area, the six-state area for which you are responsible, are there matches performed between government files and non-government files?

A. Currently, there's a—in West Virginia, there's a pilot bank match to determine whether there's bank accounts for people that are on—receiving assistance, Aid to Families with Dependent Children. There's also currently in the Commonwealth of Pennsylvania, there's a match going on with the—I'm sorry, not a match, but there's negotiations going on with the banking community in Philadelphia to do a similar type pilot.

Another example—I guess this is a government agency—is the lottery, and there's a match going on cur-

rently in Pennsylvania with the lottery, but that doesn't really—

Q. I'll ask you about the lottery separately. Coming back to the bank files, what is the purpose of the Aid to Families of Dependent Children program in West Virginia exchanging data with West Virginia banks?

A. To determine that the client or the household is claiming all the interest on bank accounts and not only the interest but actually claiming the income that's held in a bank.

[82] THE COURT: What do you mean by "claiming"?

THE WITNESS: As part of the application process, they must tell the state how much earned and unearned income is; earned income being wages, typically wages. Unearned income could be interest in a bank. That impacts on the grant, the size of the grant. You may be getting only a partial grant, if they're making a certain amount of money or have a certain amount of money in the bank.

BY MR. HIRT:

Q. How does the Social Security number relate to that type of data exchange?

A. It's used to do the match. When you open a bank account, you must give the Social Security number and match that against the Social Security number on the file with the Aid to Families with Dependent Children.

Q. Does the requirement that every member of the family provide the Social Security number for the Aid to Families with Dependent Children program have any effect on the ability to match with the bank files?

A. If you did not have the Social Security number for the child, you would not be able to match against that record—that record against the file. I guess the problem could be that the fact that there's—that they could have a bank account in that child's name, and they could have that open; and therefore, that money would, in a way—it would be hidden [83] from the computer. In other words, it wouldn't be accessed because the Social Security number would be the access.

Q. I think I'm about ready for a lunch break. Let me pursue the lottery question; that might be a natural place to stop.

I don't know much about the Pennsylvania lottery. Is the Pennsylvania lottery part of a state agency?

A. I believe it is, yes.

Q. What matching efforts are underway between the Pennsylvania lottery and other files?

A. There's a periodic match going on currently between the state lottery file of winners and certainly the Social Security number and the amount as part of that against the Aid to Families with Dependent Children file to determine whether anyone currently receiving Aid to Families with Dependent Children have won a lottery type—any lottery winnings.

Q. Do you know whether any of the other states in Region Three have any plans to cross-match with their own lotteries, such as the District of Columbia?

A. I don't have any knowledge of that.

MR. HIRT: Okay. This might be a good point, Your Honr.

THE COURT: Very well. It's now 12:15. We'll take an hour and a half for lunch, please.

(Recess taken from 12:15 to 1:45 p.m.)

* * * * *

[84] BY MR. HIRT:

Q. Mr. Stauffer, in your prior testimony you've talked about data exchange. In the situation where a client is coming into the office of the Pennsylvania Welfare Department to receive Aid to Families with Dependent Children program benefits, what type of exchange of data is done at that point?

A. Well, as soon as they—well, when they walk in, as far as the application process or procedure is concerned, they do what they call a file clearance; and a file clearance is really an inquiry through a terminal network across the Commonwealth to determine whether they're on assistance anywhere else in the Commonwealth of Pennsylvania.

Q. How is that function performed?

A. It's normally performed by a keying in of—into the computer information, as much information as possible to determine whether there's another person or another record on file with similar information. The kind of information I mean, [85] just to give you an idea of the kind of information I mean, it would be the Social Security number, name, date

of birth and sex. If they do not have some of that information, they still would do the inquiry, but they would just leave that information blank; and therefore, the inquiry would not be as precise.

Q. Is this a data exchange between two components of the Pennsylvania State Welfare Department that you're talking about?

A. No. That's within—that's really within the Pennsylvania Department of Public Welfare.

Q. Okay, I understand you. These would be separate counties.

A. That's correct.

Q. If an item of information, such as the Social Security number, is missing, what are the consequences of that?

A. The consequences are that they would—the match would not be as precise. They would only match on name, date of birth and sex—and race, if it's available. So, therefore, any match without that would have a weight factor assigned to the match that would be somewhat less than a hundred percent match.

THE COURT: What do you mean by a "weight factor"? W-a-i-t or w-e-i-g-h-t?

THE WITNESS: W-e-i-g-h-t.

[86] THE COURT: All right.

BY MR. HIRT:

Q. When this function is performed at the eligibility level, is there the same type of exchange of data that you described earlier in the testimony where a tape is physically sent to another locale?

A. Not during this type of an on-line exchange. This type of exchange is just done on-line, which means that there's a terminal that has this equipment available immediately across the state.

Q. By "terminal," a terminal to what?

A. A terminal into the main data file or computer in Harrisburg.

Q. You've talked about the various matches performed in the context of the Aid to Families with Dependent Children program. What is the benefit and earnings data exchange?

A. The benefits and earnings data exchange is the benefits—it's a Social Security file which contains Social Security benefits and also contains earnings applied to the Social Security files for credit towards retirement, Social Security retirement.

Q. Where is that exchange located?

A. That file is located in Baltimore.

Q. Is that within the jurisdiction of the Department of Health and Human Services?

[87] A. Yes, sir. That's within the department. That's within the Social Security Administration, and it's within the Department of Health and Human Services.

Q. Does this benefit and earnings data exchange have any role in the Aid to Families with Dependent Children program process?

A. Yes. Part of the eligibility process is to verify whether the person is getting earnings from any other resource as part of that process. It's a verification as to whether they're getting Social Security benefits or if they have earnings, and they would determine that through an exchange of information on a monthly basis; they exchange files. The new people that have applied or are applying for Social Security over the last 30 days—I mean applied for Aid to Families with Dependent Children over the last 30 days are sent to Social Security to determine whether they have, in fact—they are receiving benefits of any kind.

Also, that case stays there in case, subsequent to that time, someone starts to gain benefits; and therefore, that information would then be sent back to the Commonwealth.

Q. In terms of the data exchange between the benefit and earnings data exchange and the Pennsylvania local welfare department, is the Social Security number used in that exchange?

A. Yes, sir.

Q. How is it used?

[88] A. It is the main or principal means of doing the match: the Social Security number.

Q. Why do you use the term "principal means"?

A. Because there's a secondary match to determine whether that Social Security number is actually—a second-

ary match, what I mean by that is that they include name and some other identifying information—name, date of birth, sex and race—demographic or identifying kinds of information to insure that they're not really giving out information that belongs to someone else.

Q. Well, why is the term "primary" versus "secondary" used to distinguish these two functions?

A. "Primary" is that the—you have to absolutely have a Social Security number to do the match against Social Security files. This is just an additional check or qualifier to determine whether that match is a true match.

For example, if you get a match on Social Security number but there's an unmatched surname, they'll give you that information back and tell you that there's an unmatched surname. You may have a procedure to handle unmatched surname. You may have a procedure to handle unmatched date of birth. Error listings in addition to matches would actually come back for the Department of Public Welfare in Pennsylvania to determine what the situation—you know, what the problem is.

Q. In terms of the state methods of verification, [89] other than those you've listed in your prior testimony, are there other departments of the Commonwealth of Pennsylvania that are involved in data exchanges with the Commonwealth of Pennsylvania Welfare Department?

A. There's several others that are involved. I believe, just to summarize the ones I already mentioned, there's the lottery and then there's making sure that the Medicade claims processing file is mentioned. Another one is state civil service to insure that employees of the state or the Commonwealth of Pennsylvania are not on the file for Aid to Families with Dependent Children, and there's currently also a vote—there's a negotiation to do a match with vital statistics.

THE COURT: I couldn't get that. To do a what?

THE WITNESS: A match with vital statistics. The basic reason for that is to determine whether there's any individuals on the Aid to Families with Dependent Children file that may be deceased.

BY MR. HIRT:

Q. In terms of the state income tax, is the Social Security number used as the means of the Pennsylvania Welfare Department communicating with the state income tax department?

A. Right now, the state income tax match is really on the drawing board. It has not been—it has not been completed, but that will the basic means for the match.

[90] The reason that it has not been concluded to date is that there's some legal problems with that as far as the state is concerned, and there's also—the other factor is that they were behind in the state income tax file in getting that system automated.

Q. What about the state employee file?

A. Yes, the state employee file uses the Social Security number.

Q. If a person who applies for benefits at the local Pennsylvania Welfare Department doesn't have a Social Security number—let's take a situation where they've applied for one but they haven't gotten it yet—is there any sort of identifying information used by the Pennsylvania Welfare Department to keep track of this individual?

A. There's a couple of things. First of all, there's a case number, and for each individual case number within a household, there's an individual identifier or suffix code, such as the first person may be one, the second person two, the third person in the case would numerically numbered as number three.

The other thing there would be is that there's an indicator on the file that the Social Security number has been applied for. So, therefore, there's a follow-up action to insure that that Social Security number at the next client contact—if that's the first thing that may happen, may be [91] redetermination, which happens when they do a reapplication, technically speaking, for Aid to Families with Dependent Children, where they would really go through and verify eligibility once again, and they would verify then at that point what is the number that's been applied for.

Q. Is there a unique number assigned to each individual in the household at that point in time?

A. Yes.

Q. Does that unique number as to each individual have a particular name?

A. It's a client identification number. It's really an extension of the case number.

Q. Is that client identification number used by the local welfare department in any way?

A. They can use that number within the Department of Public Welfare to help track cases.

Q. Can that control number be used to perform the type of matching activities that you've described where the local welfare department wants to match with employment security?

A. No, it cannot.

Q. What is the reason for that?

A. Because the local welfare—that match is—the employment security or wage data file, which is maintained by a separate department within the commonwealth, does not maintain a case number or individual identification number. It's all [92] geared towards the Social Security number.

Q. I think you mentioned briefly in the context of the verification, work registration. What is the work registration program?

A. The Commonwealth of Pennsylvania, within certain categories of applications, which means certain people as they are applying for assistance must register for work.

Q. What is the purpose of that requirement?

A. The purpose of that requirement is to help find them jobs, assuming that they have—the Aid to Families with Dependent Children is a temporary type of a program that hopefully, as jobs become available, these individuals could be—either if they have a skill already, they would be able to find them a job with that particular skill or actually maybe help provide some training in some school, formal school, to help them get into—get off Aid to Families with Dependent Children.

Q. Does the Social Security number play any role in that aspect of the program?

A. Yes. That's an inter—that particular system is maintained by the Department of Public Welfare, and the inter-

face between that system or the communication between that system is by Social Security number.

Q. You also testified earlier that one of the matches is done at the initial stage; in other words, when someone comes [93] in to the welfare department, there is a match performed.

A. Yes, sir.

Q. What is the purpose of having a match done at that stage in the process as opposed to some point later in time?

A. Well, basically, it's a preventive type of thing. The idea is that, once assistance begins, many times it's much more difficult to stop it. So, therefore, if we weren't able to determine or we being the commonwealth, the Department of Public Welfare wasn't able to determine, say, if they were in Williamsport and someone was gaining assistance in Pittsburgh, it could go several months before something like that would be determined through another type of a match.

Q. When one of these matching efforts takes place, let's take an example of the Pennsylvania State Welfare Department and its employment security file, why is the Social Security number important to that type of data exchange as opposed to not using the number at all?

A. Well, the wage information that's reported by employers across the state is recorded by Social Security number and it's not reported by any other unique identification.

Q. What about the last name of the family?

A. You could use that as a further qualifier. The problem with using things like last names is that many times there could be the problem of—there could be a problem with misspellings. The other thing it could be is a matter of—[94] if you have names like "McDermott" and "MacDermott," is there a space, you know, those kinds of things. It becomes less standard, if you want to call it, just for the asking of using the words; and if you have "junior" and "senior," depending upon how that file is set up, it could be part of the last name, not part of the last name; those kinds of things.

The same with first names, just the fact of using names. You could have "Robert." My name could be "Robert," it could be "R.," it could be "R.G," it could be "Robert

George," or "Robert G.," so it just becomes the matching kinds of things.

Data processing isn't absolute unless you have built into it some type of a weighted kind of match; and what I mean by a weighting kind of a match is: If you match on Social Security number and you match on the first letter of the last name or the last—say, the first five letters of the last name, the first initial of the first name, and you could have qualifiers such as "Was the person born in the same year?" and that's the term I referred to earlier as a weighted type match. It's just a level of credibility in the match becomes less when you get that—so you go beyond the Social Security number.

Q. Coming back to the example you used about "MacDermott" and "McDermott," the difference being "Mac" and "Mc," where would an error like that likely appear in the system?

A. Well, if you were doing a match on name and not [95] Social Security number, you would never get a match on those unless you had built in the Soundex type thing, again a weighting kind of a match where you would determine whether this name sounds alike based on the first several characters of the name.

THE COURT: There was one word I missed. Read the first part, please?

(The preceding answer was read back in part by the reporter.)

THE COURT: The what? Soundex?

THE WITNESS: Soundex. That means that the name sounds alike.

THE COURT: How do you spell that?

THE WITNESS: S-o-u-n-d-e-x.

THE COURT: "E-x," okay.

THE WITNESS: It's a formula that was develope.., many, many years ago. That's a widely used formula. It's actually developed to get around those types of things because if you didn't have a formula like that, "Mac" and "Mc" would never match. No matter how many times you tried to match it, you would never get a match with "MacDermott" and "McDermott," even though every other piece of information

on the file was exactly the same if you were actually matching on name.

BY MR. HIRT:

Q. Mr. Stauffer, If you have a Soundex system, why do you have a Social Security number as an additional identifier?

[96] A. Well, I think it just—all the Soundex does really is gives you a lead. It's not a precise type of a match. It's the type of thing that again, you have—there's an additional step that you would have to take. If you were going to match with that example, "McDermott" and "MacDermott," and you were going to do that across the Commonwealth of Pennsylvania, I would expect that you would get many, many matches. I don't know an exact number, but you would probably get hundreds.

Q. When you say the term "you get hundreds of matches," are those correct matches of the information that you're trying to—

A. They may or may not be. Someone is going to have to investigate to determine whether they are or are not.

Q. What does the role of the Social Security number do in terms of that process?

A. It's really the tie breaker or the qualifier to determine whether someone really is that particular person. If they match on Social Security number, again back to a term I used earlier, that's the primary.

Q. Do you know whether it would be administratively feasible for, in this instance, the Pennsylvania Department, to abandon using Social Security numbers and rely upon data such as last name and date of birth in terms of doing the matches that you've described?

[97] A. From a data processing standpoint, anything is possible. The question becomes: If you ignore Social Security numbers, you would have to do a match on name and date of birth, the problem that comes in is that instead of getting a one-for-one kind of a match, you may get a one-for-ten or a one-for-five on a very unique type of individual; or in something with the more common names like Smith or Jones, you may get one for every—you may have several thousand hits. The problem with that is that that kind of information is—someone is going to have to do something with that kind

of information. From a workload standpoint, that's just an awful lot of work to put on the county assistance office.

Q. In terms of the same problem, what about the situation where the County Welfare Department in Pennsylvania wants to communicate to obtain a match in the example you gave earlier, the Camden, New Jersey, Welfare Department? How does the absence of the Social Security number impact that ability to match?

A. Well, that particular match, Pennsylvania has some control on how the format of the name is. In other words, it's last name first and then first name, and there may be—and then an initial. There's also a set amount of letters that name can be. It may be 20, for example.

The State of New Jersey, if you're going to match on names, you would have to have that same format or that same [98] number of characters to match on in the same way. As we all know, when we get a check in the mail, it's always first name, middle initial, last name; but many times on files, that is not handled in that way. It's last name, first name, middle initial. So, it's very—you know, it's handled different ways in different jurisdictions. So, it would just be—you would have to coordinate a match with New Jersey or Ohio or West Virginia to have the same criteria that you have in Pennsylvania to complete a match like that.

Q. In terms of the Pennsylvania situation, how many contiguous states are you talking about that would have to coordinate to be reconciled with this type of system?

A. You would certainly have the surrounding states, the border states: New Jersey and Delaware and West Virginia, Maryland, Ohio, New York. Then, you would also—there's been some—Pennsylvania did a match with the State of Florida just because, you know, there's an awful lot of people that end up going to Florida and return to retire. There's been some matching with, say, New York and Puerto Rico.

So, there's been those kinds of things. It's not necessarily geographic and immediate area, but there's also other special interest kinds of things that are done occasionally.

Q. You've talked earlier about the 20-letter limitation. Can you explain what that is?

[99] A. Well, for example, I think to add—to explain that, it would be—if my name was—and my name is Robert G. Stauffer, and I'm not sure even myself how many letters that is, but assuming that was two letters too many, some letters would have to be dropped on that match, and let's say the "G" would have to be dropped, so my name would be just Robert Stauffer. If the New Jersey system allowed 22 or 25 positions, that would carry that whole number—that whole first name, I mean the whole last name, first name and middle initial; and if you're going to match on that type of thing, you would never match with me.

The other factor is that you'd have to know—the computer would have to know where that data is and how long it is and what's the constraints around it. Is there spaces between first name and last name, and those kinds of things because they have to search and determine that. They have to make their "Robert G. Stauffer" like the same as me, as mine.

Some computer systems are relatively old and they may not—they have different ways of doing that. I may drop the initial, someone else may drop my whole first name except for the "R." So, all of those things would have to be standardized wherever you were going to match if you were going to do a name.

Q. How does the Social Security number get involved with this type of potential process?

[100] A. Again, that's the primary identifier, and again, the name becomes a secondary kind of thing where the match is determined if you actually have the right person.

Q. In terms of the use of the Social Security number in the manner that you've described it, why is it that each individual member of a household has his or her own Social Security number rather than, let's say, a husband and wife sharing the same number?

A. Basically, it's because the number is used for many things, especially it's used for things of immediate concern, like the medical assistance type thing, to insure that the child is getting the proper medical treatments, and the other—and it's also used to determine—making sure the earnings, wages—or really, it's probably more likely, especially in a very young child, that there could be some un-

earned income. By unearned income, what I mean is interest in a bank or something like that, where they would—you know, which again has to be counted toward eligibility determination.

They could, theoretically, you know, put money in a child's account and not feel that they have to report it; and I guess the further information on that is that for Social Security benefits down the road, as we are working through our careers and if we're paying into Social Security system, that information is credited on a quarterly basis. So, therefore, [101] there's a good chance that down the road that person may have scrambled earnings if there's more than—you know, if more than one person is using that Social Security number.

Q. What do you mean by the term "scrambled earnings"?

A. By scrambled earnings, I mean that if two people are using the same number, that may very well be applying double benefits to that number. It's usually that the reverse problem happens where I may be working and have the wrong Social Security number and I'm not getting credit for any of my earnings rather than—therefore, it's going to someone else's account.

So, the earnings, when I say scrambled, are scrambled between two—probably two accounts, where one is not getting the proper credit, the other account is getting too much credit.

Q. Coming back to the interjurisdictional example you gave before of the Camden, New Jersey, Welfare Department and, let's say, Philadelphia County Welfare Department, if the Philadelphia County—I don't know if it's a county, but I assume it is—

A. Yes.

THE COURT: Philadelphia is a city and it's coterminus with the County of Philadelphia.

MR. HIRT: Okay, fine. I guessed that was the case.

THE COURT: It's the only one I know of.

[102] BY MR. HIRT:

Q. Assume the situation where the Philadelphia County Welfare Department is trying to match with Camden—

A. Yes.

Q. —for the purpose of the Aid to Families with Dependent Children program benefit application process. If the situation were such that the family in the intake situation in Philadelphia says, "We have a family of four," and the father has a number, the mother has a number, separate numbers, but they're single child has the father's number, what sort of impact would that have on the ability of a match with the people in Camden?

A. Well, they would only be able to match on the father. They would only match on what numbers they have. They wouldn't be able to match on the child; and therefore, if there was a chance that there was also a case in Camden under that same situation, they would never be able to identify that if they only had the one Social Security number. In other words, there may be a case under a different number in Camden for that child.

Q. In terms of your experience with the Pennsylvania system in particular and your other regional experience, do you have an opinion as to whether the various alternatives that have been posed by the plaintiffs, which I've outlined, would be feasible in terms of operating the type of computer matches that [103] you've described?

MR. GILDIN: Your Honor, I object to that question. As far as the pre-trial order with respect to listing expert witnesses, the defendants noted that they had no witnesses as experts; and if he's asking this person an opinion question, it seems to me totally inappropriate.

MR. HIRT: Well, Your Honor, I have several responses. The first response is that I have asked Mr. Stauffer a series of opinion questions already without objection. I think that this line of question has already been pursued without a timely objection.

The second point I would say is that the pre-trial memorandum of the federal defendants does not say exactly what Mr. Gildin purports. I think I said carefully that I did not construe the necessity of designating the HHS people as expert witnesses. I would take the position, Your Honor, that Mr. Stauffer has testified as to his familiarity with the Pennsylvania system and with the HHS regional program,

and that I think his personal experience qualifies him to give an opinion.

I would say in that regard, Your Honor, that at least my reading of third circuit case law would support his giving opinions whether as a layperson or as an expert; and I think that he could qualify as an expert, but I don't believe that he necessarily has to qualify as an expert. I think his opinion should be taken and accepted by the Court in terms of [104] his familiarity with the program and how it could be restructured.

THE COURT: Well, it's my recollection that the rules do provide that we can take opinion evidence from laymen, even if they're not qualified as experts. Let's see what the rule is. It might be 702. That's not what I'm looking for.

MR. HIRT: Your Honor, I was going to proffer 701 as the alternative.

THE COURT: Let's take a look at that. That's the one I'm looking for. Well, I think he's qualified to express an opinion, so I'll overrule the objection.

MR. HIRT: An opinion as a lay witness, Your Honor?

THE COURT: I can't hear you.

MR. HIRT: His opinion as a lay witness, as a nonexpert witness?

THE COURT: Yes, I think so.

MR. HIRT: I would note, Your Honor, just for purposes of my construing the third circuit case law, at least the case I've read called Teenad versus Kimbell indicates, "The modern trend favors the admission of opinion testimony provided it is well founded on personal knowledge and susceptible to specific cross examination," and I think I've satisfied that.

I don't think this case should turn on whether Mr. Stauffer is designated as "Expert," and I think that his opinion should be taken in terms of his role in the program [105] because the plaintiffs are trying to say that the program should be adjusted.

THE COURT: All right.

THE WITNESS: The way I understand the alternatives is that, number one, using the same Social Security number. First of all, the Pennsylvania system, as it is currently processing data through it, cannot have a duplicate Social Secu-

rity number. So, if two people had the same number, they could not—it would be rejected as an error.

So that as far as using the other indicators, name or date of birth, that type of thing, I suppose that that could be used to get assistance out to—when I say assistance, Aid to Families with Dependent Children—out to the client. However, the shortcoming of that is that there would really be no way of determining whether any other kinds of things needed to be matched. There would be no way to do any other kinds of matching, I guess, outside of very internal type DPW kinds of things that could be adjusted to meet these criteria.

Again, they would both depend—they would both require modification to the system.

BY MR. HIRT:

Q. And by "DPW," that's a shortened initial for the Department of Public Welfare—

A. The Department of Public Welfare, yes.

Q.—which is what we've called the Pennsylvania [106] Welfare Department.

A. Yes.

Q. That's my term, just so we're communicating.

What about the situation where apparently a name seems unique; in other words, it's not the "Robert Smith" situation? Does your opinion still apply that the cross-matching is frustrated?

A. Yes, because again there's a qualifier on every kind of match element you're going to get. Obviously, the Social Security number is a nine-digit numeric field. If you're getting into names, it's a different—there's no national standard on how long a name can be or how you spell a name or those kinds of things.

So, therefore, "Little Bird of the Snow Roy" is quite lengthy; and assuming that the DPW system could accommodate that—and I'm not sure whether it could or couldn't at this point—I'm not sure every other system could accommodate that type of name for future kinds of things; and I believe that the way it is on the system right now, it's on there as "Little" and then "B.," and then "Roy." So, they were unable to accommodate that.

MR. GILDIN: I'll object and move to strike the answer unless the witness says he knows how it is on the Pennsylvania system, not "I believe."

THE WITNESS: Yes, it is on the system that way.

[107] THE COURT: Well, he didn't give the name the way it really is, and that does illustrate a problem. It's not "Little Bird in the Snow," it's "Little Bird of the Snow," as I understand it. Is that right?

MR. HIRT: Well, I think that's right, but I think the witness is trying to say that the shortened term would be "Little B."

THE WITNESS: Yes.

THE COURT: Before we leave this, I've been wondering about this point for just hours: Are you going to have some witness who will testify to what numbers are available?

MR. HIRT: What numbers are available? I don't know whether I follow. Can I ask you to clarify, Your Honor, what you mean by "what numbers are available"?

THE COURT: I want to know whether 515-94-1802 is available. That's "Little Bird of the Snow" phonetically.

MR. HIRT: That's your phone analogy, Your Honor—

THE COURT: Right.

MR. HIRT: —where you translate her name into a phone number. I can proffer a witness who can testify to that. It won't be Mr. Stauffer.

THE COURT: You will be asking somebody about that, if it can be utilized?

MR. HIRT: Yes. The offer of proof, which I think I can make, is that there's flexibility in the system to the [108] extent that, within a range of available numbers, what I'll call a menu, although I'm not using the term I don't think as computer people know it, we could present a piece of paper perhaps to Little Bird of the Snow's family and say: We have a series of numbers that are available.

THE COURT: That's not quite what I'm asking. All I'm asking is: Is the number 515-94-1802 available?

MR. RESSLER: Your Honor, could you repeat that number?

THE COURT: Yes. 515-94-1802. I don't profess to any originality on this. This is a well-known system, which I use every day for tremendously long numbers.

MR. RESSLER: Your Honor, I believe the witness is attempting to discover that and answer your question.

MR. HIRT: We might be able to get an answer for you.

THE COURT: Well, I just want to hear something about that before the case is over.

THE WITNESS: There may be. The only thing I may add to that is that, as far as the verification process of Social Security numbers, that state welfare departments can actually put into their system to determine whether a number is valid or not is a formula based on a series of numbers that actually determines whether that number has been issued, so that actually, the computer—in other words, what that does is [109] avoids people making up numbers and inputting them, and they at least validate that that number has been issued.

THE COURT: Okay.

BY MR. HIRT:

Q. Mr. Stauffer, in terms of the number requirement, do you have an opinion as to whether the size of a system of beneficiaries in Pennsylvania in the Welfare Department requires the use of the Social Security number to differentiate them as individuals?

A. Size? I'm—

Q. In other words, the volume of clients in the program.

A. I guess, if you're getting into that there's about 200,000 Aid to Families with Dependent Children cases in the Commonwealth of Pennsylvania, and as far as impacting on size, you would—if you did any modification to the system, you would also have to pass—and you were going to do a different kind of check, every record would have to go through that type of a check.

Q. If the Social Security number, for the sake of argument, were not used, would you still require a unique numerical identifier to perform those tasks that you've outlined in your testimony?

A. Yes.

Q. Why is that?

[110] A. Because there's got to be a way to get to the individual client to do verifications, at least on an interim basis while the Social Security number hasn't been assigned because even though we—it's a requirement to have a Social Security number, really the requirement is that they must have applied for it. So, the idea is that it may take several weeks, or depending upon the situation, to get that number into the file; and with a short turn-around time of 15 days to declare eligibility or not, that sometimes the requirement is that the SS-5 has been submitted.

Q. Okay. Now, you've just used a term called "SS-5." What does that stand for?

A. That's an application for a Social Security number.

Q. Is that a particular written document?

A. That's a standard document used across the country for not only welfare or Aid to Families with Dependent Children clients but also used for anyone else in the public, any other private citizen or anyone that wishes to get a Social Security number for whatever reason they need it.

Q. If it weren't possible to require Social Security numbers from individuals such as the Roys, how would that family be identified for the purpose of maintaining them in the welfare system?

A. They're identified through the case number and then a suffix code for each individual.

[111] Q. From your prior testimony, is that a unique case number already assigned to them as individuals?

A. Yes.

Q. If an alternative system of identification had to be formulated—and let's take the example of using the name information—how would that impact the coordination of the Pennsylvania Welfare Department with the other data bases that they use to match?

A. As far as outside of the—

Q. Outside of that.

A. —Department of Public Welfare?

Q. Yes.

A. Well, they would not be able to—they wouldn't be able to match that record against the file, against any other jurisdiction unless there was an accommodating change to

the system at the other end, which means, to translate that, is that they wouldn't be able to match that record in Philadelphia, if the person were in Philadelphia, against a Camden file or a New York file or a West Virginia file.

Q. Do you know whether there's any coordination of the Aid to Families with Dependent Children program with the food stamp program?

A. Yes. The ultimate goal in Pennsylvania for the Aid to Families with Dependent Children, the medical assistance program and the food stamps program is to put them all in one [112] file or data base. So, ultimately there will only be one file.

Q. What is the purpose of centralizing them, those three systems?

A. Basically, it's to—again, back to the integrity of the system—to insure that people that are maybe closed in one case, you know, if they find out that the Aid to Families with Dependent Children case has been closed, it would automatically close the medical assistance case and automatically close the food stamps case.

Q. What is the consequence of a case not being properly closed?

A. They could stay on assistance for—you know, indefinitely until there was a data exchange that would—or some other thing, you know, some admittance or some question during a reapplication process that you would find out that that person still has their medical assistance identification card, which allows them, for example, to still get their hospital and doctor bills covered.

Q. You just mentioned the consequences of not being able to close a case. What about the situation where a family moves, let's say, from Lycoming County to Centre County where Penn State is located; if you didn't have a Social Security number, what would be the possible consequences for that family establishing their entitlement in the new county?

A. If, when they went to apply for assistance in the [113] new county or if they told this county that they were transferring, there would be very little impact because all you'd have to do is: You know the case number and the indi-

vidual identification numbers, and they would be able to open up and transfer that case from one county to the other.

I guess if you went and applied for assistance without realizing that you had to know your case number and really didn't know your case number or didn't know something, some other identifying factor, then it's—you know, they would probably be able to find you. The problem is that without the Social Security number it becomes more difficult.

Q. By "case number," are you referring to that same unique numerical identifier—

A. Yes.

Q. —that the Pennsylvania Welfare Department uses internally to identify each and every individual in that system?

A. That's correct. If they had the case number, it would be absolutely no problem. They would pick that up immediately. If they didn't have the case number and had to go to something other than Social Security numbers, they would find them, I'm sure; it would just be more difficult.

MR. HIRT: Your Honor, I'm pausing just so I can try to consolidate this.

THE COURT: Take your time.

MR. HIRT: As Mr. Giblin did, I do not want to read [114] into the record, unless Your Honor prefers, some of the undisputed facts unless Your Honor prefers I do it; I can do it.

I have one or two facts I want to ask the witness about to clarify, but there are a number of facts that parallel his testimony; and rather than reading them into the record, I can either cite them or they'll speak for themselves when we brief it.

There are two paragraphs from the statement that I want to address to him, but I don't want to go through others.

THE COURT: Well, that's all right. I'm going to accept all of the undisputed facts; and as far as the briefing is concerned we're going to decide this the day after the hearing, so that there's not going to be any opportunity for further briefing. I think you're all better off that way.

I don't know whether any of you have ever sat as a judge or been a law clerk for a judge, but it's my experience that if

you wait even a week that your memory starts to dim, so that we reserve a day after each non-jury case and spend that almost completely on the findings of fact. If we can't get them finished in the day, then we spend two days; but by that time, at the end of that time, we've got all the facts found, and then we just let the law flow from that.

MR. HIRT: May I ask, although this is not part of the testimony, when you say that the day after the trial is assigned for this, how is counsel's role in this process?

[115] THE COURT: The day after?

A. MR. HIRT: The day after the conclusion of the testimony, what is the role of counsel for the parties in that process?

THE COURT: Well, it doesn't even exist.

MR. HIRT: It's you and your law clerk?

THE COURT: That's right. I'll hear, after the evidence, complete closing arguments; and it's just like a jury going out and making the findings.

MR. HIRT: Okay, fine. I just didn't understand when you say "we," what "we" was.

BY MR. HIRT:

Q. Two of the paragraphs, Mr. Stauffer, of the undisputed statements say that Little Bird of the Snow's name and birthdate were entered into the computer which DPW, the Department of Public Welfare, and HHS, Health and Human Services, use to determine eligibility for welfare benefits.

There's a similar paragraph, 60, that says that Little Bird of the Snow's name and birthdate were entered into the computer which the Department of Public Welfare and the United States Department of Agriculture use to determine eligibility for welfare benefits.

I guess I can only ask you, unless you know, the second question to the Department of Agriculture: What computer is being referred to there in terms of eligibility for benefits?

[116] A. That's the computer in Harrisburg, the Department of Public Welfare computer.

Q. Is that computer under the custody of Health and Human Services itself?

A. No, it's not.

Q. Do you know what the case is with regard to the food stamp information?

A. It's the same.

Q. Is it the same?

A. It's the Department of Health and Human Services; it's all on the same computer.

MR. HIRT: I think that's all, Your Honor.

THE COURT: Thank you. Excuse me, when you say, "that's all," I think you mean—

MR. HIRT: I have no further questions at this time, Your Honor.

THE COURT: All right. I turned to the plaintiffs; however, I think the better practice is to ask the defendants whether they have questions.

MR. RESSLER: I have no questions of this witness, Your Honor.

THE COURT: All right. Now, we'll go.

MR. GILDIN: Thank you, Your Honor.

[117] **CROSS EXAMINATION**

BY MR. GILDIN:

Q. Now, Mr. Stauffer, you were a substitution for Mr. Factor.

THE COURT: It's Stauffer, isn't it?

THE WITNESS: Yes, sir.

MR. GILDIN: I'm sorry.

BY MR. GILDIN:

Q. You were substituted for Mr. Factor as a witness in this case.

A. Yes.

Q. So, I take it you reviewed Mr. Factor's affidavit before you came to testify?

A. Yes, sir.

Q. Did you review Mr. Harant's affidavit before you came to testify here?

A. Yes, sir.

Q. Did you review any other documents in preparation for your testimony?

A. No formal—just my own documentation within my office, you know.

Q. You did review your own documentation within your office.

A. Yes.

Q. Did you bring that documentation with you here [118] today?

A. I have some of it here in my briefcase.

Q. Is any part in Williamsport that's not in your briefcase, in your hotel room, or is the rest of it back in your office?

A. It's back in my office.

* * * * *

[126] [THE COURT:] All right. We'll take our 20-minute recess.

(Recess taken from 2:47 to 3:12 p.m.)

MR. GILDIN: Your Honor, what was produced in response to our Rule 612 request were two volumes, one which is the general systems design, describing this Family Assistance Management Information System, including from what I can divine from my very cursory review of just the titles how this system works and to what extent the Social Security number is or is not indispensible; and a second full notebook of information, which quite frankly during this recess, Mr. Miles and I, as hard as we've tried to get a start on it, were unable to really get very far in terms of understanding what's here.

Our request, Your Honor, would be: rather than to recess and give us 30 minutes or 45 minutes to try to read it and then come back, would leave us 15 minutes until defense counsel has to catch their airplane, we would ask at this point in time to recess until Monday morning and give us the opportunity over the weekend to read these two volumes.

We think that it would make it more efficient with respect to the cross examination of Mr. Stauffer because maybe [127] some of the questions we had for him will be answered upon our review of this; and I would hope it could narrow down our inquiry and ultimately save everybody's time.

THE COURT: What is the view of the federal defendants on this?

MR. HIRT: Well, Your Honor, I think that the problem that I have is that I don't understand why counsel can't pro-

need with the cross examination that presumably they've already prepared; and obviously, two of the documents which they said that Mr. Stauffer might have relied upon are two of the affidavits, which they already have; and so, Your Honor has ruled that they're entitled to look at information that presumably the witness has looked at. They've already had since February two of the documents, which are the affidavits of Mr. Harant and Mr. Factor.

The other point, Your Honor, I would make: Although it's represented that these are big volumes of material, I haven't looked at these myself either. I know that part of it is the statute and some regulations; some of it is some manual material. I wonder why we can't proceed and see how far we get because we're running into time problems in this case, as we go on and on; and we do need to stop at 4:15 since the Court has said that we can recess at that time so we can get our plane. It seems to me that an hour of time is very valuable at this point.

[128] THE COURT: What do you want to say?

MR. GILDIN: Your Honor, reading the federal rules—

THE COURT: Let's hear from Mr. Ressler first.

MR. GILDIN: Oh, I'm sorry. Excuse me.

MR. RESSLER: Your Honor, I would like to make two points. The first point I believe I've already made is that plaintiffs had a opportunity to do discovery, and I don't believe that this rule was meant to serve as a substitute for their failure to take discovery. These weren't documents that are secret documents.

This particular document here that plaintiffs wish to look at has a Social Security publication number. It certainly isn't a secret document. These are the type of documents that I believe it's fair to assume—this is called the general systems design—and if the plaintiffs had done any discovery at all, they would have been able to discover this document and have reviewed it in plenty of time.

* * * * *

[129] MR. GILDIN: Your Honor, I can only tell you what the problem is. The federal defendants' pre-trial memorandum, where they summarize the testimony of the witnesses, it states that their testimony will be based upon

the statements already before the Court in the affidavits submitted in support of the federal defendants' motion for summary judgment; those being the affidavits of Mr. Factor and the affidavits of Mr. Harant.

The review of those affidavits indicates no testimony even approaching what Mr. Stauffer had to say with respect to the types of detail he afforded. These documents appear, upon our review, to be the detailed description upon which he relied. The extent to which this system can or cannot function [130] with a Social Security number, the extent to which a Social Security number will allow information to be used to determine grants and to determine eligibility; again, Your Honor, this divined from a mere cursory review that the 20 minutes afforded.

I would hope that if we're really trying to find out whether Mr. Roy has to continue to be faced with the choice between living at the level he's living without these benefits with the prospect of food stamps being removed on the horizon and whether there are, in fact, any less restrictive alternatives, that we're now hearing the heart of the issue, at least from the defense standpoint, that no less restrictive alternatives exist, that their system is threatened if one individual cannot have a Social Security number.

* * * * *

MR. HIRT: Well, Your Honor, the only statement I would make, Your Honor, is that I think Mr. Giblin is presenting a lot of legal argument that's not addressed to the specific issue; and I agree with Mr. Rossler that these issues have been addressed in terms of being visible to both sides since February when the original motions were filed; and this is being used as [131] a substitute for last-minute discovery that would have been beyond the scope of discovery, with the discovery cutoff that was agreed to when we did an order back in the fall.

* * * * *

MR. HIRT: Your Honor, my concern for the record is that the witness has informed me that these are the only copies of his documents; and because we're approaching the weekend, he does not know how he can get access to another copy that

we might want to look at before we start again on Monday. That's the concern I'm trying to go over with him.

THE COURT: Well, does he need it over the weekend?

MR. HIRT: Well, Your Honor, the problem I have is that I haven't looked at these documents either; and under Your [132] Honor's arrangement, which I don't have any problem with theoretically, that the plaintiffs will have these documents presumably until Monday when we start again; and these are in a sense documents which don't have copies that are easily available to me at this point in time.

THE COURT: Well, I think we've got to balance it; and it seems to me that the plaintiffs have more need for them over the weekend than the defense does. So, we'll have to go with that.

I have a feeling that after all of this skirmishing you're not going to come up with much from going into these books anyhow. So, go ahead.

MR. HIRT: Okay.

THE COURT: I didn't direct that at you, Mr. Hirt. I was directing that at the plaintiffs. I think they're to be commended for wanting to shoot the weekend going through all of those books, but I doubt that it's going to produce very much of significance in this case.

MR. HIRT: I agree. I think the plaintiffs might be disappointed.

THE COURT: Let's see what we can do yet today.

BY MR. GILDEN:

Q. Now, you stated that you are familiar with Mr. Fiscus's affidavit; is that correct?

A. Yes, sir.

[133] Q. He describes the general purposes of the Social Security number in that affidavit.

A. Yes.

Q. One of those general purposes is to make sure that you get as much information as possible about an applicant's eligibility for assistance; isn't that correct?

A. Yes, sir.

Q. That's to make sure that the benefits are properly paid to that individual?

A. Yes, sir.

Q. Simply stated, you want to make sure that someone doesn't receive welfare benefits that he or she is not entitled to; isn't that right?

A. That's one of the reasons. I mean, that's probably the primary one, also.

Q. Are you aware that in this case, sir, it is undisputed that, except for their refusal to provide a Social Security number, Little Bird of the Snow meets all the requirements for eligibility for cash assistance and medical assistance?

MR. HIRT: Your Honor, I object on relevance grounds. We've gone over this on the opening statements, that obviously, if they weren't eligible for benefits, they wouldn't even been in this court as party plaintiffs.

MR. GILDIN: Your Honor, I think we're at the core of what Mr. Hirt described as our disagreement in interpreting [134] the law. From his perspective, it's irrelevant, this case is irrelevant in the name of the system; that is, if they have an interest in system-wide fraud, they can in essence sacrifice Mr. Roy.

Our position all along has been: If they have no interest in requiring this individual to provide a Social Security number or that his individual case poses no risk of fraud, I think that's quite relevant as to whether the government's interest is compelling and whether we have to worry at all about a less restrictive alternative.

THE COURT: We'll overrule the objection.

BY MR. GILDIN:

Q. The question again, sir, is: Are you aware that in this case it is undisputed that, save for the refusal to provide a Social Security number for Little Bird of the Snow, and Ray family meets all the requirements for eligibility for cash assistance and medical assistance?

A. Well, I understand from the Court, from what I've heard in the last few days, yes.

Q. You have no information to the contrary.

A. Yes.

Q. That's true at all times since January 1, 1982, when they began receiving these benefits.

A. I have no information as far as dates are concerned.

MR. GILDIN: Your Honor, for the record, Stipulated [135] Fact 25: "Except for his refusal to provide a Social Security Number for Little Bird of the Snow, Mr. Roy has met all the requirements for eligibility for cash assistance and medical assistance for Little Bird of the Snow at all times since January 1, 1982."

BY MR. GILDIN:

Q. Are you aware also, Mr. Stauffer, that the amounts which Little Bird of the Snow was entitled to for medical assistance and cash assistance are similarly not in dispute in this case?

A. From what I understand and what I've heard in the court, yes.

Q. Now, Mr. Factor describes that a second general purpose of the Social Security number is to make sure that there's no duplication of checks; is that correct?

A. That's correct.

Q. That's to make sure that an individual doesn't get paid twice in the same month for a particular benefit?

A. That's correct.

Q. It's only really a problem if that individual doesn't give that extra money back; isn't that correct, from the system's standpoint?

A. From the system's standpoint, it becomes a recoupment issue. Obviously, if they get a duplicate grant, it becomes a different kind of a problem.

[136] I think with erroneous payments, it's a problem in that—when do you find out when that person—that duplicate check went out, and it's subject to a quality control finding; and if that is not found in a timely manner, they can be caught in an error, which again can result in a financial sanction against the state.

Q. But the error really only applies if the person who receives that double benefit doesn't go back to the welfare office and say: Well, you made a mistake. You paid me twice.

A. They would have to do it immediately.

Q. But if they did, it would have no impact on the state; would it?

A. It's—it would also again depend on timing as far as when that—the system would be updated to determine and

to show that that information or that check was returned. It becomes a timing problem, I guess the point is. If it takes several days to get the check in the mail and receive the check, and it may take a day—assuming that they even get it back in the same day and then input that change, there could be several days or maybe a week's worth of—where that duplicate payment is out, and it's out of control; and if a quality controler reviewer reviews during that specific period of time, theoretically, there would be an error on the double payment.

Q. There would be an error; but if the state got its money back, that would have no impact on the amount of dollars [137] available for the welfare programs; right?

A. The problem is: It would be an error because of the duplicate payment, and duplicate payments is an error.

Now, getting the money back is the followup actually for that kind of thing, but they would be liable because they allowed the duplicate payment to go out.

Q. So, your concern is with the existence of the error rather than whether the state ends up having the money back from the recipient or not.

A. That is, yes.

* * * * *

[143] BY MR. GILDIN:

Q. All right, Mr. Stauffer, we talked about the notion of determining that benefits are properly paid and the notion of duplication of checks.

I see that the third general purpose cited by [144] Mr. Factor is to prevent fraud; is that correct?

A. Yes, sir.

Q. However, in this case, as we've just talked about, there's no real dispute as to eligibility nor the amounts of benefits to which Little Bird of the Snow is entitled.

A. From what I understand, yes.

A. Let's take a look a little more closely, specifically as to how you use the Social Security number to serve these more general purposes.

I believe one of the things that you talked about was that the state welfare agency is required to use certain wage in-

formation as part of determining both the eligibility and the amounts of these welfare benefits; is that correct?

A. Yes, sir.

Q. You talked about looking to some sources such as the state unemployment agency.

A. Yes, it's the same agency. It's the Bureau of Employment Security and unemployment compensation; it's maintained in the same agency.

Q. Now, at age three, Little Bird of the Snow isn't receiving any wages; is she?

A. I would doubt that, sir.

Q. Nor would she be receiving any sort of unemployment compensation benefits.

A. I agree, sir.

[145] Q. However, if we're talking about the need to verify wages and unemployment benefits, our concern is with the parents of this three-year-old girl; correct?

A. Yes, sir.

Q. You would need the Social Security number, then, of the parents to accomplish that purpose.

A. The only thing I would like to add to that—you're correct. The only—

Q. Thank you, sir. That's my question.

MR. HIRT: Your Honor, I think the witness has a right to finish an answer that he thinks is responsive.

THE COURT: Well, I don't think so. Let's do it this way: If there's something that he wants to bring out that isn't brought out later on with the cross examination, you're going to have a right to ask him questions on redirect, and it can be brought out at that time.

MR. HIRT: Fine, Your Honor.

BY MR. GILDIN:

Q. You realize, sir, that the government has the Social Security numbers, both of Mr. Roy and of his wife, Karen Miller; isn't that true?

A. Yes, sir.

Q. Now, you also talked about the Social Security number being used in matching programs.

A. Yes.

[146] Q. I don't know if it was you or Mr. Factor who talked about the use of it to match federal employees with the state welfare rolls.

A. Yes, sir.

Q. Now, Little Bird of the Snow, at age three, is not a federal employee; is she?

A. I would assume not, sir.

Q. Now, you also talked about inter-jurisdictional matches, the importance of matching welfare benefits drawn, for example, in Pennsylvania and those drawn in another state or another county.

A. Yes, sir.

Q. Now, with respect to the program of Aid to Families with Dependent Children, Mr. Roy is required to provide his Social Security number as a condition of his daughter, Little Bird of the Snow, receiving these benefits; isn't that correct?

A. He's also—he has to also apply for a Social Security number for her.

Q. Right, but my question was that you will not give Little Bird of the Snow these benefits unless Mr. Roy, in every case, provides his Social Security number as well.

A. Both, yes, sir.

Q. In fact, in this case, it's undisputed that Mr. Roy did provide his Social Security number.

A. Yes, sir.

[147] Q. If your concern is that someone will be applying improperly for these welfare benefits, it's rather unlikely that at age three Little Bird of the Snow is going to go into any assistance office without her father or without her mother and apply for Aid to Families with Dependent Children; correct?

A. I'm not sure of that, sir. There could be a reason that the mother could possibly—I mean, they could apply for benefits in one jurisdiction and the father in the second jurisdiction.

Q. Thank you. The question is that one of her parents is going to have to provide a number in all events; right?

A. Yes, sir.

Q. At age three, you don't really anticipate that she's going to go into a welfare office without either of her parents

and apply for benefits and just be able to provide her number?

A. It would have to be another adult, sir. I'm not sure it would have to be a parent.

Q. So, in every event, they're going to ask for the number of an adult; correct?

A. Yes, sir.

Q. You talked about matching the Aid to Families with Dependent Children recipient rolls to other data exchanges; and I believe that one of your examples was the food stamp rolls.

A. Yes, sir.

[148] Q. Just like you just described with respect to the Aid to Families with Dependent Children, in order to get food stamps for Little Bird of the Snow, either her father or mother are going to have to provide their Social Security number.

A. That's correct, sir.

Q. Indeed in this case, it's undisputed that both her father and mother did provide their Social Security numbers when they applied for food stamps for Little Bird of the Snow.

A. From what I understand, sir.

Q. Just as we've been talking about with respect to the Aid to Families with Dependent Children benefits, it's rather unlikely that age three Little Bird of the Snow is going to go [illegible] and apply for benefits without another adult there.

A. I would agree, sir.

Q. And that adult would have to provide his or her Social Security number.

A. Yes.

Q. You also talked about federal matches with other Social Security Administration files; correct?

A. That's correct, sir.

Q. One of those was railroad retirement.

A. Yes, sir.

Q. Of course, that has nothing to do with this case, does it, as there's no evidence that any of these individuals are receiving [illegible] ilroad retirement; correct?

[149] A. There's no evidence of that, correct.

Q. You talked about black lung benefits; isn't that right?

A. That's correct.

Q. As far as anyone knows in this case, there's no concern with black lung benefits being received by Mr. Roy or his wife, Karen Miller.

A. Correct.

Q. You also talked about old age benefits for the retired or the disabled people; didn't you?

A. That's correct.

Q. But again, that has nothing to do with this case because Mr. Roy is not of the age to be retired; is he?

MR. HIRT: Your Honor, I just want to object, that when counsel is using "nothing to do with this case," I think he's presenting a legal question. These issues have everything to do with the case; they may not have something to do with the factual situation; but I think Mr. Gildin should address his questions specifically to the witness as to facts, not as to the legal contention.

THE COURT: What's your view, counsel?

MR. GILDIN: Your Honor, if he wants me to use the term "facts of this case," I'll be happy to do that.

THE COURT: All right.

[150] BY MR. GILDIN:

Q. Of course, the notion of being retired or being disabled and your interest in checking against those welfare rolls really has nothing to do with the facts of this case, as concerns Mr. Roy and his wife, Karen Miller; is that correct?

A. The way I understand it.

Q. Then, you talked about the fact that it's important because it's used for retirement benefits; correct?

A. There could be retirement. It also could be for survivor's benefits kinds of things. If one parent died, and the children—they would get the benefits for the child.

Q. Thank you. But again, neither the retirement nor, as you elaborated, the notion of the parent who's deceased have anything to do with the facts of this case; do they?

A. As it stands currently, yes, I would agree.

Q. Then, you talked about matching it against lottery winnings. Are you aware of the age in Pennsylvania that you have to be to be properly receiving lottery benefits?

A. I believe it's 18.

Q. So, a three-year-old is not going to be receiving lottery benefits for another 15 years if she happens or he happens to be that lucky; correct?

MR. HIRT: Your Honor, I don't know what he means by the term "receive." I think that's an unclear question.

THE COURT: I'll overrule the objection.

[151] THE WITNESS: Obviously—my answer would be that they would not be able to have—they would have to give a Social Security number, I believe, when they pick up their earnings; and obviously, they would not be able to accept one for someone that's under 18.

BY MR. GILDEN:

Q. So, with respect to the Little Bird of the Snow who's now three, this interest that you promulgate won't be relevant at least for 15 more years.

A. The way the situation is now.

Q. Then, you talked about matching it against the people who are deceased; is that correct?

A. That's correct.

Q. But again, that has nothing to do with the facts of this particular case; correct?

A. As it currently stands.

Q. Then, you talked about that the Social Security number is used for what I believe you termed "the missing kids project."

A. Yes, sir.

Q. The purpose of this is to identify children who are on your files as receiving Aid for Families with Dependent Children but who do not, in fact, exist.

A. That's one of the reasons.

Q. The other reason I believe you cited is that they [152] are not living in the family unit; correct?

A. That's possible, and also it could be that they're not getting the screening, as I mentioned earlier.

THE COURT: They're not getting what?

THE WITNESS: They may not be getting their medical screening.

THE COURT: Okay.

BY MR. GILDIN:

Q. Now, of course, with respect to Little Bird of the Snow, there's no question about her existence, is there?

A. A question about her existence?

Q. Yes.

A. I assume not.

Q. It's undisputed in this case that she's living in the family unit; isn't that correct?

A. That's correct.

MR. HIRT: Your Honor, I don't think there's been any testimony that she's living in the family unit at this point.

MR. GILDIN: Mr. Roy testified—

THE COURT: Wait a minute.

MR. HIRT: In other words, there's not been a definition, Your Honor, that—as I understand the testimony, Mr. Roy and his wife and the two are living together right at this point in time. I think Mr. Roy may testify to that, as to [158] he and Little Bird. Since Karen Miller has not testified, I'm not too sure that's been established.

THE COURT: All right. I'm going to overrule the objection.

THE WITNESS: The way I understand it, yes.

THE COURT: Now, before you ask the next question, I am so unused to ruling immediately after an objection is made that it seemed almost peremptory to me and bordering on the discourteous. I want counsel to realize that the only reason I'm doing it is because of the time problems Mr. Roesler has.

MR. HIRT: I understand, Your Honor. I just want to make sure that I can interject some of these objections.

THE COURT: What did you say?

MR. HIRT: Your Honor, I understand. I just want to make sure that I can interject some of these objections to what I consider questionable questions.

THE COURT: Absolutely. There's nothing wrong with that at all.

BY MR. GILMN:

Q. Now, I believe you also testified that this Social Security number is important to make sure that families receiving payments in the Aid to Families with Dependent Children program are properly registered in the job program that I believe you entitled the WIN program.

A. The WIN program is an acronym in the statement. [154] In Pennsylvania, they actually have a work registration program. "WIN" stands for Work Incentive.

Q. Are you saying there are two programs, a work incentive and a work registration?

A. The work registration in Pennsylvania is equivalent to the WIN program nationally.

Q. This applies to children between the ages of 16 and 19, correct?

A. Yes, sir.

Q. So that given that Little Bird of the Snow is three years old, it's going to be another 13 years until it's going to be necessary to register her into this WIN program.

A. Correct.

Q. Now, I believe either you or Mr. Fuster stated that the Social Security number is used in the child support program.

A. That's correct.

Q. This is to trace absent parents to make sure they are properly supporting their children.

A. That is correct.

Q. In fact, sir, this is one of the leading problems in the Aid to Families with Dependent Children system, as congress pointed out; correct?

A. What's that, the absent parents?

Q. Fathers perhaps who have left the home and are [155] earning money, which would make them ineligible for welfare benefits, but their families, who they left behind, are receiving welfare benefits.

A. It's certainly a problem, a major problem. I don't know how that fits in with the congress, to be honest.

Q. But you agree that it's a major problem.

A. Yes.

Q. Of course, in this case, that's not a problem at present because Mr. Roy and Ms. Miller both are, in fact, present in the home.

A. From what I understand.

Q. Indeed, it's true that they're here because of the concern for the welfare of the child; correct?

MR. HIRT: Your Honor, I think that's argument and not a question. I don't think the witness can answer the reason for him being here.

THE COURT: All right. What's your view, counsel?

MR. GILDIN: Your Honor, I think it's an appropriate question to show that the witness agrees that this purpose is simply irrelevant to this case.

THE COURT: I'll sustain the objection.

BY MR. GILDIN:

Q. I believe Mr. Factor talked about—although I didn't hear you mention today—in his affidavit to justify the requirement of the Social Security number, that it's used [136] in computer screens, which were developed by the Office of the Inspector General. Are you familiar with those?

A. I'm familiar with that.

Q. He identified that these screens were used to identify duplicate Social Security numbers.

A. That is correct.

Q. They were also used to identify Social Security numbers that were used fraudulently.

A. That is correct.

Q. Of course, if we're talking about this case, sir, the issue is whether Little Bird of the Snow should be required to provide this Social Security number at all.

A. That's the way I understand it.

Q. So, we really can't justify the requirement of the Social Security number to determine if she uses more than one or uses it fraudulently; correct?

MR. HIRT: Your Honor, I have the same objection that I had before; that this is not asking a question, this is presenting legal argument.

THE COURT: What's your view, counsel?

MR. GILDIN: Your Honor, I'm trying to divine the purposes that this number is used for; and to the extent that

there are general purposes, which this man has just agreed that they're used for, I'm just asking if he concedes that it has nothing to do with this case—the facts, I should say, of this [157] case.

THE COURT: Read the question.

(The pending question was read back by the reporter.)

THE COURT: All right. I'll sustain the objection.

BY MR. GILDIN:

Q. It's your understanding, sir, that Little Bird of the Snow does not have a Social Security number; correct?

A. That's what I understand.

Q. Certainly, you would agree that she does not have more than one Social Security number.

A. From what I understand, sir.

Q. Could you please tell us your understanding of what the purpose of the cash assistance program is?

A. My understanding is that the cash assistance program is a program to provide cash to needy families with dependent children. Cash assistance is a generic term that really, I believe, covers both Aid to Families with Dependent Children and it can cover the General Assistance program in the state.

Q. All right. Let's limit it to the Aid to Families with Dependent Children, which is one of the two programs that you're concerned with here today; correct?

A. Correct.

Q. Why is it that your agency provides this cash assistance?

[158] A. Why is it?

Q. Yes.

A. Because there's needy people and they need the cash, they need the assistance.

Q. What do they need that for?

A. They need it for—just to provide a home, utilities, et cetera.

Q. It's your understanding that, if they meet the requisites of financial eligibility, the problem is that without this cash assistance they may have some difficulty meeting their basic needs; correct?

A. From what I understand of the program, yes.

Q. With respect to the medical assistance program, would you please tell us what the purpose of that program is as you understand it?

A. The purpose of the program is to provide medical payment or Medicade, as it's referred to federally, medical assistance to needy individuals.

Q. I understand that the purpose of the program is that, without this additional medical assistance, there might be some inability of these people to meet the medical needs of their families; correct?

A. That's correct.

Q. So, therefore, if someone met your financial eligibility requirements, that is your need requirement—

[110] A. That's correct.

Q. —and you denied them—

THE COURT: Wait a minute. He said, "That's correct," and you didn't finish your question.

MR. GILDIN: I agree, Your Honor. I think he beat me to the punch there.

BY MR. GILDIN:

Q. If there was a family or an individual who met the need requirements and you nonetheless denied them the Aid to Families with Dependent Children cash assistance, they might have some difficulty meeting their basic needs; correct?

A. Correct.

Q. In fact, if you denied the medical assistance benefits to a family that met the financial need requirements, that this family might have some trouble paying for necessary medical services.

A. What program are you talking about?

Q. I'm talking about the medical assistance program.

A. I guess that if they're eligible for Aid to Families with Dependent Children, they're financially eligible, they'd be automatically eligible for the medical assistance program. It is possible that they may not be eligible for Aid to Families with Dependent Children but could be eligible for the Medicade program. That's the only clarification I wanted to make.

[160] Q. Assuming a family was eligible for the medical assistance program under the needs basis—

A. Yes.

Q. —and you denied them those medical benefits—

A. Correct.

Q. —they may have some difficulty meeting the necessary medical needs of their family; correct?

MR. HIRT: Your Honor, I want to interrupt and say: When Mr. Gilden is using the term "you," I want to make it clear that it's not the Department of Health and Human Services, the federal defendant, that is making the act of denying the benefits. It is a local welfare official who makes these decisions, perhaps pursuant to some outside direction, but the question, as stated, is certainly improper.

THE COURT: The question as stated is certainly what?

MR. HIRT: The question as stated is certainly improper in terms of the facts of these programs.

MR. GILDIN: It's rather interesting, Your Honor, because Mr. Kessler stood up in his opening statement and said: We had nothing to do with it. We had no choice. And he said: We were just following what the federal government told us.

Now, Mr. Hirt is standing up and saying: Well, this is all a matter of the local level, and we're bouncing back and forth with no one wanting to take responsibility for [161] these decisions.

THE COURT: All right. Well, I'll overrule the objection.

BY MR. GILDIN:

Q. If I may repeat the question: If a family met the need requirements for the medical assistance program, and the United States Department of Health and Human Services denied them those medical benefits, they could have some trouble meeting the requisite medical care for their family; correct?

A. That's correct.

Q. Therefore, these purposes of the program, which you carefully described, could be undermined by this denial of benefits to the needy family.

MR. HIRT: Your Honor, again, I think he's presenting legal argument. I don't think that the term "assistance would

be undermined," I don't think this is within the scope of the witness' expertise.

MR. GILDIN: Your Honor, I think it's an appropriate question. He's agreed with the purposes, he's agreed that these would be the results, and I'm just asking him whether those purposes would be undermined by the denial of assistance.

THE COURT: I'm going to sustain the objection because there wasn't any question at all.

BY MR. GILDIN:

Q. If in fact medical assistance and cash assistance [162] was denied to a family which met the need requirements, isn't it true that these purposes of the program that we've been talking about here would be undermined?

MR. HIRT: Same objection, Your Honor.

MR. GILDIN: Well, if Your Honor said it wasn't a question, I added "isn't it true that," and I stand on my former argument.

THE COURT: All right. I'm going to sustain the objection, but not for the reason given. You've got a negative in the question. A "yes" answer means one thing; a "no" answer means exactly the same thing as the "yes" answer.

I'll put it to you this way: Is it not true that it's not raining outside? How do you answer that, Mr. Gildin?

MR. GILDIN: I would have to think about it and probably still give you the wrong answer.

I'll rephrase the question. It's a very instructive example.

BY MR. GILDIN:

Q. Sir, if you denied benefits to a needy family, the purpose of allowing them to meet their needs would be denied; correct?

MR. HIRT: I have the same substantive objection.

THE COURT: I've been so concerned with the procedural aspects of the objection to the question that I don't know what your substantive objection is. Now, give it to me [163] again.

MR. HIRT: The substantive objection that I have is that I don't think Mr. Stauffer can say whether the purpose of a particular program has been undermined or violated or

whatever, based on this type of question. I don't think that's a question for this witness.

THE COURT: What's your view, counsel?

MR. GILDIN: Your Honor, I think I'm entitled to ask that question. It's relevant to this case.

THE COURT: I'll overrule the objection, and we'll hear what he has to say. If you can't answer the question, say that you can't answer it.

THE WITNESS: I'm not sure I can answer that question. The only way in which I can answer it is qualified, that within certain parameters that are set by the state and federal governments to meet the needs of those programs.

BY MR. GILDIN:

Q. If you denied this assistance to someone who met those parameters, you would not be fulfilling the purposes of the program.

A. Well, there's other parameters besides need parameters: Parameters to insure that the integrity of the system is maintained and those kinds of parameters are for eligibility determination. You have to provide certain kinds of information.

Q. Thank you. But the purposes that you and I were [164] just talking about that is the concern that people without certain monies would not be able to meet the needs of life, the necessary medical care, would be defeated if the assistance was denied where they were financially eligible.

A. I'm not sure I'm qualified to answer that.

Q. So, your concern isn't really whether we meet the needs of the financially eligible, you have larger concerns.

MR. HIRT: Your Honor, I think he's arguing with the witness.

THE COURT: What's your view, counsel?

MR. GILDIN: I don't think that was argumentative at all.

THE COURT: Well, I was signing an emergency order in another case, and I didn't get the question. So, I'll have to ask you to read it back.

(The pending question was read back by the reporter.)

THE COURT: I'll sustain the objection because the question has a negative in it.

* * * * *

[165] (Court adjourned at 4:00 p.m.)

[166] INDEX TO WITNESSES

For plaintiffs:	*Direct*	*Cross*	*Redirect*	*Recross*
Richard Drinnon				
By Mr. Hirt		3		
By Mr. Ressler		17		
For Defendants:				
Robert G. Stauffer				
By Mr. Hirt	55			
By Mr. Giblin		117		

INDEX TO EXHIBITS

For Plaintiffs:		*Identified*	*Admitted*
Nos. 4-9—	Identified in Volume I; portions read in admitted		22
No. 14—	Adjudication of the Department of Public Welfare	22	—
No. 16—	Excerpts from hearing transcript Department of Public Welfare Hearing Examiner; portions read	29	39

[3] [May 21, 1964]

(Whereupon, 10:00 a.m., reconvene.)

ROBERT G. STAUFFER,

recalled as a witness on behalf of the Defendant, having previously been duly sworn according to law, testified as follows:

THE COURT: Mr. Gildin, I believe you were in the midst of your cross examination of this witness, is that correct?

MR. GILDIN: Thank you.

* * * * *

CROSS EXAMINATION (Cont'd)

BY MR. GILDIN:

Q. Mr. Stauffer, we were talking on Friday as to how your system was concerned with identifying all wages of the [4] welfare recipient, correct?

A. Yes, sir.

Q. And in reviewing the materials that you provided I notice that there is some indication, based upon a Senate finance report, that 76 percent of the errors in the Aid to Families with Dependent Children program are a result of non-reporting of income, correct?

A. That's—yes, that's correct. That was a committee when the wage data match law was passed.

Q. And they found that over three quarters of the mistakes came as a result of people not reporting income.

A. That's correct.

Q. And I believe we talked about on Friday, and you agreed, that with respect to Little Bird of the Snow Boy, at age three, she is not going to have any income.

A. Wages. But income and wages are two different things.

Q. The other would be unemployment benefits, I believe you said.

A. Well, you have interest from a bank, I mean there is, you know, there is earned income and unearned income.

Q. But you have no information about any income from a bank that she has, do you?

A. No, sir.

Q. So it's her parents that would be the person [5] generating income in this case.

A. As I know the facts.

Q. Okay.

Now, the system you described, this computer system for the Aid to Families with Dependent Children program, is called—you referred to it as FAMIS, F-A-M-I-S, correct?

A. Yes.

Q. And that stands for Family Assistance Management Information System.

A. Yes, sir.

Q. And one of those documents which you provided, the materials which were not in the notebook but which I put in this notebook, describe the general design or general systems design for this computer system, correct?

A. Yes, sir.

MR. GILDIN: Your Honor, may I approach the witness, please?

THE COURT: Yes, sir.

MR. GILDIN: I'm providing the Court with two copies of what has been marked as Plaintiff's Exhibit No. 20; providing the witness with a copy, copies have been provided to opposing counsel.

BY MR. GILDIN:

Q. Now, what has been marked as Plaintiff's Exhibit [6] 20 are portions of that manual about the design of this system, is that not correct?

A. Yes, sir.

Q. And what this manual does essentially is describe how this computer system works, is that correct?

A. Yes, general systems design, correct.

Q. And it also describes the role that the social security number plays in this computer system you were talking about.

A. Yes.

Q. Now, the goal of the federal government in establishing this program or plan is to try to, to the extent possible, standardize the computer systems in each of the states which will be involved in the Aid to Families with Dependent Children program, correct?

MR. HIRT: Your Honor, I just want to object. Certainly Mr. Stauffer cannot speak for the entire federal government. He is from the Department of Health and Human Services.

THE COURT: I'll sustain the objection.

BY MR. GILDIN:

Q. The goal of the United States Department of Health and Human Services in designing this system is, to the extent as possible, standardize the computer systems that will be used by the states in administering the Aid to Families with [7] Dependent Children program, correct?

A. Yes, sir.

Q. And what you would like to be able to do is to allow each state to be able to have access to whatever information on the welfare applicant may exist in the federal government's computer?

A. That's one of them. The federal government's computer—you mean the Social Security Administration?

The federal government doesn't necessarily have computers as such. I mean, the Department of Agriculture nor the Department of Health and Human Services, welfare or food stamps, Aid to Families with Dependent Children do not have computers so to speak.

Q. Well, to the extent that there are computers in the federal government—in different divisions of the federal government—the goal of this system, or one of the goals of this system, so to allow each of the states to have access to whatever computers do exist.

A. Yes.

Q. And in turn, you would like to be able to have the federal government be able to have access to the computers run by or controlled by the states, correct?

A. Yes, sir.

Q. And in addition, one of the goals is to allow one state to compare information on a welfare recipient which it [8] has with information which another state may have on that recipient.

A. Yes, sir.

Q. So essentially the plan here is to be able to have a standardized system that can reach into as many data banks

as possible to gather as much information as possible about a welfare applicant.

A. That's one of twelve—eleven or twelve, I'm not sure, exact number of functions of the system. I mean, that is just one of them.

Q. Thank you. And the way that you make these systems coincide or make the systems be able to search another state or the federal system, are through what are known as correlation factors, I believe.

A. There's correlation factors that are used basically for the intrajurisdictional state-type matching.

Q. And can you explain what you mean by a correlation factor?

A. A correlation factor—I think we spoke of them on Friday, when you add social security number, when you had things like last name, middle initial, you know, first name, date of birth, et cetera, those kinds of things. It's for the intrajurisdictional match across, say, the Commonwealth of Pennsylvania to determine if anyone is on their Aid to Family with Dependent Children.

[9] Q. So what we say, if I understand it, is here is a group of information about the person that we have, please search your files and look for information on the name of this person, on the birth date of this person, on the residence of this person, on the social security number of this person?

A. That's one—yeah, that procedure is in that document, yes.

Q. And that is the procedure that is used by this computer system?

A. That's one of the procedures used by that computer. That is, again, that is a limited state-only kind of thing within the Department of—for example, checking to see if Aid to Families with Dependent Children of Department of Public Welfare.

Q. So the social security number is one of the factors by which you identify the identity of the welfare applicant, right?

A. But I believe if you look, I don't have the page here, but if I remember correctly the major factor, by far the most significant.

Q. Thank you, but my question was, it is one factor, correct?

MR. HIRT: I think the witness is allowed to explain his answer, Your Honor.

[10] THE COURT: Well, I think what he ought to do is try to answer it with a yes or no, *if* he can—

A. All right. That's one factor—

THE COURT: Wait a minute.

A. Sorry.

THE COURT: If it needs explanation we can get it later on in redirect.

A. Yes, that is one fact. Sorry.

BY MR. GILDIN:

Q. Indeed, if you turn to—and the pages are numbered for the Court's convenience. We believe the instructions were we did not have to renumber them if they had been renumbered in one fashion.

THE COURT: Right.

MR. GILDEN: There are about six or eight chapters in this books, Your Honor, each chapter is numbered by the Roman numeral indicating the chapter and then the page within that.

THE COURT: Yes.

BY MR. GILDIN:

Q. If you turn to Roman numeral two, page four, Mr. Stauffer.

THE COURT: I have it.

BY MR. GILDIN:

Q. Are you there?

[11] A. Yes.

Q. It indicates that the purpose—reading from the second paragraph—(Reading) The purpose of the General Systems Design is to establish at least the following characteristics: (End of reading.) And subparagraph B says, (Reading) Capacity for verification of factors with other agencies through identifiable correlation factors such as social security numbers, names, date of birth and home address. (End of reading.) Isn't that correct?

A. That's what it says, sir.

Q. Now, we talked about that the intent was to attempt, to the extent possible, to standardize the systems of the various states, correct?

A. Your correct.

Q. And the hope is that some day the same standards will be used outside of the Aid to Families with Dependent Children program, correct?

A. I'm not—

Q. To be able to use it in other federal/state welfare programs.

A. I'm not sure of that.

Q. Well, could you turn please to Roman numeral two, page three?

A. Sure.

Q. If you look at the fourth paragraph, beginning [12] with the words "In addition".

A. Yes, sir.

Q. (Reading) In addition to assisting in determining the basic requirement for system design, FAMIS. . ." which is this system, right, F-A-M-I-S, ". . .has been designed to provide the following objectives: End of reading) And at the bottom it says, the last one with a little circle next to it, it states there, (Reading) FAMIS could be the standard for future eligibility determination for other programs. . ." (End of reading) that is, and it lists a Title XX, Title XIX and food stamps, correct?

A. Yeah, that is a limited kind of type of thing. I mean, that is basic—in other words, Title XIX is specialty and food stamps, are both categorical eligible for the Aid to Famiy with Dependent Children, which means they were automatically eligible.

Q. And therefore the goal, some day, is to use this system in determining eligibility for food stamps?

A. It could be used as a basis, based again, on the fact that if you're eligible for Aid to Family with Dependent Children, you're also eligible for food stamps.

Q. But that system is not yet in place, is it?

A. The system in Pennsylvania, you're talking about?

Q. No, the system where the federal government uses this FAMIS, F-A-M-I-S, system for food stamps.

[13] A. No. It's just a Title IV-A, or Aid to Family with Dependent Children.

Q. Now, every state does not have this system in place for its Aid to Family with Dependent Children system, does it?

A. No, sir.

Q. And you stated that Pennsylvania is working on putting it in place.

A. Yes, sir.

Q. In fact, all states are not required to use this standardized computer system, are they?

A. No, sir.

Q. It's an optional system.

A. Yes, sir.

Q. And it's purely voluntary.

A. Yes, sir.

Q. And each state is going to have to decide for itself whether or not it wants to adopt this F-A-M-I-S system, correct?

A. Yes, sir.

Q. And furthermore, while this manual sets forth some general standards for the states who elect to use it, there is some room for the states to modify this system, isn't there?

A. This has—again, it's a general system design, [14] contains both the mandatory and the optional features of the system.

Q. Well, the system recognizes, does it not, that each state may differ in its operation of the Aid to Families with Dependent Children program?

A. That's correct.

Q. And a state may have some special problems which arise, correct?

A. Yes.

Q. And this system hopefully can adapt to those special problems, correct?

A. Correct.

Q. If you turn, please, to page Roman numeral two, and page eight of that, okay, the last paragraph on that page beginning with the words, "It is recognized..."?

A. Yes.

Q. It reads, (Reading) It is recognized that the environment in which the Title IV-A program operates . . . (End of reading) Now, before I go on, that Title IV-A is Aid to Families with Dependent Children.

A. Correct.

Q. (Reading) It is recognized that the environment in which the Title IV-A program operates differs to a certain degree from state to state. It is also acknowledged that some states have specialized problems, unique unto [15] themselves. (End of reading) And the last line of that paragraph reads, (Reading) It is anticipated that any special circumstances or unique problems that may exist can be addressed during the detailed design phase. (End of reading) Isn't that correct?

A. Yes.

Q. Now, this computer system is composed of various, what are termed modules, correct?

A. That is correct.

Q. And could you explain, if you could, what a module is in as plain terms as possible?

A. I think it's probably best to explain it through an example. A couple of examples is, there is a financial module which includes the issuance of the checks, reconciliation of the checks returning from the bank, and then the financial control of the funds against the budget, for example, to ensure that the state funds don't go over budget either by county or state-wide; that would be one module.

Q. Well, more generally, as a definition for the term, it's a group of functions that are related in some fa[illegible]on that the computer performs?

A. Correct.

Q. And the system categorizes various different groups of functions, isn't that correct?

[16]A. That's correct.

Q. Now, at the bottom of Roman numeral two, page nine, the last paragraph, second line, beginning "Insofar as possible. . . .", are you there?

A. I'm sorry, which?

Q. Okay. Roman numeral two, page nine.

A. Yeah, I have that.

Q. The last paragraph on that page.

A. Yeah.

Q. The second sentence in that last paragraph beginning with the word "Insofar...".

A. Yes, I have it.

Q. The manual states, (Reading) Insofar as possible, efforts have been made in the general systems design not to preclude the extraction of various modules out of the total system to meet limited needs. (End of reading.) Correct?

A. Yes.

Q. So a state can decide that one of the functions that this general system provides need not be used by that state, correct?

A. If circumstances warrant, correct.

THE COURT: I would have thought that that would be just the reverse of that. It seems to me that it sounds as though you could pull out certain modules to meet limited needs. I thought that meant, you pull them out to meet the [17] limited needs of the state by using that module. Maybe that's not what that says.

MR. GILDIN: Well, Your Honor, I think either way it makes no difference, and I think I can clear that up by a question to the witness to clear up that ambiguity.

THE COURT: All right.

BY MR. GILDIN:

Q. The state may elect then, to decide which of the modules in the general design it prefers to use.

A. There's mandatory requirements. I mean, from the optional ones, certainly; this general systems design has both.

Q. Now, in fact, each state which elects to use the system can really, if it chooses, have its own particular grouping of the modules to a limited extent, correct?

A. Yeah, to a limited—again, there is mandatories and then there's optional.

Q. Well, if you turn to the bottom of Roman numeral three, page one please. Do you have that?

A. Right.

Q. The last paragraph, the second sentence, beginning "The modules...".

A. Yes.

Q. And that reads, (Reading) The modules may be incorporated into a state's AFDC system in whole or in part [18] depending on the structure of the relationship in that state and the method of determining AFDC eligibility for the stated. (End of reading.) Correct?

A. Yes.

Q. Now, you talked about another purpose of this system is to allow the states to have access into whatever federal computers may exist.

A. Correct.

Q. And it fact, sir, isn't it true that the state will determine its methodology or format of getting into the federal computers?

MR. HIRT: Your Honor, I want to question the relevance of this line of inquiry. I think he has talked to some extent about the purpose of the computers, but I don't know what state discretion in terms of access to certain files has to do with the social security number requirement.

MR. GILDIN: Your Honor, the fundamental question in this case with respect to the government's contention is that absent the social security number the system cannot work. On direct examination Mr. Stauffer talked about the use of the number and why it was mandatory, and I think we are entitled to find out what flexibility exists in this sytem.

THE COURT: Well, how much longer do you think the interrogation on this phase is going to run?

[19] MR. GILDIN: I have one question. I'm going to point him out to one portion of the manual on that.

THE COURT: Okay, I'll overrule the objection, but I am concerned about the passage of time here.

MR. GILDIN: Thank you, Your Honor.

BY MR. GILDIN:

Q. On Roman numeral three, page eight, right above the number three on that page. Are you there?

A. Yes.

Q. It says, (Reading) Federal files will be accessed by the state verification module through a single file format generated at the state level. (End of reading.) Isn't that correct?

A. That's—yes, that's what is says. I mean—

Q. Okay, thank you.

In some—

MR. HIRT: Your Honor.

THE COURT: Yes?

MR. HIRT: I don't understand this line of inquiry. The witness is being asked to state the authenticity of what is written on a document, but I don't see what the purpose of his vouching for what is on the document is.

THE COURT: Well, I think the objection is getting in late, so I'm going to overrule—

[20] MR. HIRT: Well, it's because I presume, Your Honor, that there is going to be a question based upon his vouching for that authenticity.

THE COURT: All right. I didn't grasp that. It has some merit. What is your view about that, counsel?

MR. GILDIN: Your Honor, I will certainly—I've already had the gentleman concede that this is the manual which describes the system he is talking about.

MR. HIRT: Which manual speaks for itself.

THE COURT: Well, wait a minute. We are wasting a lot of time, Mr. Hirt. I've already said I'm not going to permit seesawing and that is just exactly what's happening.

Now, of what importance is this statement which he has read on page—chapter 3-8.

MR. GILDIN: Your Honor, it indicates that the state will determine for itself what information is going to be necessary—what information and through what format it will seek access to these federal files, and it is quite relevant to whether the social security number must be used to get into those federal files.

THE COURT: Well, I understand what this says, but I don't understand how it's relevant. You will have to explain it to me more fully.

MR. GILDIN: Your Honor, if this is the manual that describes in detail the system to which this gentleman [21] testified on direct examination, it appears to us that this is how the system works. And it certainly elaborates and explains whether or not—whether the system has the capacity

to do certain things with or without Little Bird of the Snow's social security number.

THE COURT: All right. What importance is this sentence that you read, that's what I don't grasp at the moment. What does it prove as far as this case is concerned?

MR. GILDIN: Your Honor, it proves that there is no federally mandated standardized system for access into the federal computer files.

THE COURT: All right. I'll overrule the objection.

BY MR. GILDIN:

Q. In sum, with respect to the general functioning of this computer, Mr. Stauffer, the activities and the system described in this manual are not necessarily entirely applicable to all states, are they?

MR. HIRT: Your Honor, I want to object. Certainly the witness has only been asked the provisions of isolated portions of this manual. The witness did not rely upon this manual on direct. The witness would have to go through every page of the manual, under that question, to determine the answer to that question.

MR. GILDIN: Your Honor, it states this right in [22] the manual and if he disagrees I will show him where in the manual it states precisely that.

THE COURT: Well, I'll overrule the objection and permit a limited inquiry but I really—may I see counsel, please?

(Side Bar Conference:)

THE COURT: The reason I am having you up here is I'm going to be slightly critical and I don't believe in doing that in open court.

It does seem to me that an awful lot of time has been spent, Mr. Gildin, on this cross examination which hasn't proven a great deal to me. I would think that two-thirds of the time that was spent yesterday fell into that category, and if we had a whole week here available I would just ride along with it, but I am concerned about the amount of time that is going into this cross examination and I want you to be sure to bring out everything that you think is important, but I have trouble grasping how some of this is.

MR. GILDIN: Your Honor, I can represent to the Court that based upon what this manual says with respect to how

this system works, we can establish, through our cross examination of this witness, that you do not need a social security number to determine that an applicant is eligible; you do not need the social security number to access the [23] federal files to get information on Little Bird of the Snow in the federal files; you do not need the social security number to search the other state files that this witness referred to.

THE COURT: Well, is there a position by the government that you do have to have a social security number for the state to get into the national system?

MR. HIRT: Your Honor, I think that the federal position is that while one cannot force the state to say we will use only the social security number access, the testimony of the federal government is that that is the critical control factor. And I don't think anything in these out-of-context excerpts suggest any way, one way or the other, whether the social security number is the principle factor or not.

The only question that was arguably relevant that was elicited was the statement about that one would use factors such as social security number, names, date of birth and home addresses. But there has been no cross examination that showed anything about that the social security number is in some way superfluous to the system.

THE COURT: I'm trying to find out whether it is the federal government's view that it is necessary—or even the state government—that it is necessary to have the social security number before you can gain acess to the [24] federal system.

MR. HIRT: That's correct, Your Honor.

THE COURT: And is it your view to the contrary?

MR. GILDIN: It is our view to the contrary, Your Honor, and it's supported by this document which this witness used as the basis for his testimony and we will bring that out.

THE COURT: We will permit you to go ahead. How long do you think your cross examination is going to run?

MR. GILDIN: Maybe I can clarify. This is the point in time where we will establish that the system doesn't need the number. With respect to their second witness, who we expect they'll call, if he is going to talk about the computer, we can represent to the Court that our goal—

THE COURT: Wait a minute, let's not get into the second witness before we see him.

MR. GILDIN: What I'm trying to say to you—

THE COURT: We don't even know whether he is going to testify, and if he testifies and you want to use portion of this document to rebut it, that may well be proper.

How long do you think your cross examination of this witness is going to take?

MR. GILDIN: This is going to be our longest cross examination because this is the point in time where we will explain that this number is not needed in this system.

[25] This other cross examination will not take very long because it is at this point in our case that we will establish that this system does not rely on this number to, while it uses it, it is not indispensable to do the eligibility and verification determination.

We beg the Court's indulgence in the timing of this. If, in fact, the cross examination does what it does, we may not need any rebuttal witness at all.

So our election is to devote the limited time allocated to the cross examination of this witness, while it may appear that the proceedings aren't being expedited, the net effect would be to make this case go much faster.

THE COURT: You haven't answered my question as to how long you expect your cross examination of this witness to go.

MR. GILDIN: We would expect one hour.

THE COURT: All right. Well, it's now 10 o'clock, and let's see if we can close it up by eleven.

(End of Side Bar Conference.)

BY MR. GILDIN:

Q. Mr. Stauffer, even though, as you have testified that the F-A-M-I-S system described in this manual will not be applied in every state and won't be identical in every state, let's take a look at the general functions of this particular system, in particular, how it determines whether [26] or not an applicant is eligible for welfare benefits.

I think there are three basic functions done by what is known as the client certification subsystem, is that correct?

A. That is correct.

Q. The first is to accept and record information from the welfare applicant.

A. That's correct.

Q. And the second function, isn't it true, is to determine the client's eligibility for assistance.

A. That's correct.

Q. And the third thing this system is designed to do is to go ahead and confirm the eligibility by verifying the information in other sorts of systems, correct?

A. That's correct.

Q. Now, the first function, as you have described it, is to accept and record information from the applicant for welfare benefits.

A. That's correct.

Q. And what happens is, at this initial step, is that the local caseworker will interview the client and take as much information as possible from the client.

MR. HIRT: Your Honor, I have an objection. Mr. Gildin is now framing testimony and asking the witness to agree with it or not agree with it. I think he should ask [27] him what does the term mean from the FAMIS manual, but not to give projected testimony and then ask Mr. Stauffer to agree or disagree.

MR. GILDIN: Your Honor, when we were reading from the manual he told me that I was supposed to be asking questions from the witness, and now when I'm asking questions from the witness's knowledge he is saying I have to read from the manual. I think I'm entitled to do either.

THE COURT: I'm going to sustain the objection. I do not think you are asking him a question. What you are doing is making a statement and then saying is that correct.

I think you ought to phrase these in the form of an interrogatory to him.

BY MR. GILDIN:

Q. Well, Mr. Stauffer, the manual describes the process of accepting and recording information from the client, doesn't it?

THE COURT: That is exactly what I said you should not do, Mr. Gildin. Please ask him the question. Don't make a statement and then ask him to agree with it.

BY MR. GILDIN:

Q. Mr. Stauffer, does the manual describe the information that the local welfare intake worker is supposed to take from the client?

A. It describes the process.

[28] Q. If you could take a look at page Roman numeral VI-9 of the manual, sir, at the top of that page, is that the information that the caseworker is supposed to take from the client?

A. That's the sample information certainly at that period of time.

Q. And one of those factors, of course, is the social security number.

A. Yes.

Q. Will there be people who, at this initial application stage, do not have a social security number?

A. Could be.

Q. Now, based upon this information, would the caseworker determine preliminarily whether or not the applicant is, on the basis of this information, eligible for the cash assistance benefits?

A. As on the state procedures.

Q. But the manual—does this manual suggest that is what would happen, that the caseworker would determine, based upon the information received directly from the client, the potential eligibility of that client?

A. The manual gives an example of how it happened.

Q. Well, I point your attention to—on Roman numeral VI-9 of the paragraph labeled 1-03. (Reading) Based on the data gathered, a determination of potential [29] eligibility is then made by the AFDC caseworker based on the preliminary data gathered in the interview ... (End of reading.) Isn't that correct?

A. That's correct.

Q. And then, if the welfare worker determines that it looks like the applicant is eligible, it's at that point in time that the first computer search on this person is done, is that correct?

A. Not in Pennsylvania.

Q. Well, based upon this manual it notes that if— on page six—Roman numeral VI-9, looking at the portion just above 1-06, (Reading) If the initial findings are that the applicant is potentially eligible an intrajurisdictional verification inquiry, using the CRT terminal . . . is then accomplished. (End of reading.) Correct?

A. That's the way the book describes it, that doesn't necessary mean it works that way in every state.

Q. Well, with respect to this recommended system described in this F-A-M-I-S manual, that is how it works, correct?

MR. HIRT: Your Honor, I think he just testified how it works is not necessarily what, in fact, is done in the real world.

THE COURT: What is your view, counsel?

MR. GILDIN: Your Honor, again, we are talking [30] about the government's reason that it believes this number is required to be used, this is the manual which we have established is the guidelines for this system. If he wants to go into redirect examination to explain the differences, I think he is entitled to, but this document, again, is relevant to this procedure.

THE COURT: Read the question, please.

(Question read)

All right. I will overrule the objection, although there is still a statement followed by a question. You may answer that.

A. Yes.

BY MR. GILDIN:

Q. And in fact—I'm sorry. Strike that please. And as part of this intrajurisdictional verification inquiry, this computer search, certain information is punched into the computer to ask the computer to search certain data, correct?

A. Are you asking how or—are you asking in the book or are you asking in reality?

Q. Well, I am asking, at this point in time, in this F-A-M-I-S system design manual, sir.

A. That's what the manual says, yes.

Q. And the information that is put in the computer, as set forth in page Roman numeral VI-9, is the following. [31]

isn't it, (Reading) last name, first name, middle initial—turning the page—county of service, birth date, sex, the race, and the social security number of the applicant. (End of reading.)

A. That's correct.

Q. And so in the intrajurisdictional search, the computer doesn't only search the social security number, does it, it searches for all of these factors with respect to the welfare applicant?

A. That's correct.

Q. And I believe, as you stated, some of the applicants may not even have a social security number at this point in time.

A. That's correct.

Q. And even if they do have a social security number, sir, would the system still look for this other information on the applicant?

A. Yes.

Q. And is that because it wants to—I'm sorry, strike that please.

And is that because some people have more than one social security number?

A. I don't know that. I can't answer that.

Q. Well, the system does not rely solely upon the social security number to find information about the [32] applicant in the state's own Aid to Family with Dependent Children files, does it?

A. Not on this particualr kind of match. It's one match of many.

Q. In fact, could you do this search under this system as described in the manual without a social security number?

A. It would—the word I'm trying to—it would not be—obviously it would lose some of it's credibility. You could do the search, certainly.

Q. I believe you just stated it would affect the credibility of the search. Is that the same thing as the weight of the search?

A. Yes.

Q. As I understand this, as described on page VI-10, certain of the identifiers, that is, the things that are put into

the system, are assigned various numerical weights, is that correct?

A. That's the way the book has it.

Q. Pardon?

A. That's the way the—yeah, that's the general—that is the sample in the book.

Q. And when something matches you get a plus factor, correct?

A. Correct.

[33] Q. And if there is something that doesn't match that indicates a minus factor in numerical terms.

A. Correct.

Q. And is it the goal then to get as many—if you're trying to verify who someone is—as many plus factors as possible?

A. Yes, certainly.

Q. It indicates here on page Roman numeral VI-10, that the social security number match has a plus value of 220, correct?

A. Correct.

Q. And it shows that the last name has a plus factor of 198.

A. That's correct.

Q. And the first character of the first name has a plus 88.

A. Correct.

Q. And as to the remainder of the first name, has a plus 72.

A. Correct.

Q. And if you match it on the middle initial, plus 22.

A. Correct.

Q. And so if you matched on all four of three indicia of the name, you would have a weight of plus 390, correct?

[34] A. That's correct.

Q. And social security number was 220.

A. Yeah, that's correct.

Q. And then if you looked at the birth date, if you matched on the month, day and year of the birth date, you would have another plus 84, correct?

A. Which? I'm sorry, matched on what, sir?

Q. I'm sorry, I got that added wrong.

If you matched on the month, day and year of birth, you would have another plus 116, correct?

THE COURT: I think it's 114, counsel.

MR. GILDIN: I'm sorry. You're correct, 114.

A. Yes.

BY MR. GILDIN:

Q. So, if you matched on the name and the birth date—better do this arithmetic a little more slowly this time—you would have a plus factor of 494, correct?

MR. HIRT: Your Honor, which name is he talking about? The first, middle—

MR. GILDIN: The full component of the name match and the full all three components of the birth: day, month, year. That would be 494.

A. I don't have a pencil to add it. I assume that's correct.

BY MR. GILDIN:

[35]Q. Now, it has been agreed here that Little Bird of the Snow Roy's name and birth date are on the computer which the United States Department of Health and Human Services and the Pennsylvania Department of Public Welfare use to determine eligibility for cash assistance, correct?

MR. HIRT: I just want to make sure that it's clear from the testimony, Mr. Stauffer said that that was the Harrisburg computer; it's not the Department of Health and Human Services' computers. Let's make sure that is clear on the record.

THE COURT: Well, I don't understand. If there is something wrong with the question, make an objection to it. If there is nothing wrong with it, then we will hear what he has got to say.

MR. HIRT: There is nothing wrong with the question as such, as long as it's clear from the question that it's—

THE COURT: Well, there is either something wrong with the question or there isn't, Mr. Hirt. I can't rule on something like this.

If you object to the question I'll be glad to rule on it. If you don't object to it, then I want to have it answered.

Do you object to it?

MR. HIRT: Well, Mr. Stauffer clarified what the [36] term "the computer that is used" means and I just want to make sure that is clear for the record that it's not the Health and Human Services' computer.

THE COURT: Well, you see, but it's improper for counsel to be saying what has got to be clear on the record. It's up to this witness to clear that up.

MR. HIRT: All right, Your Honor.

THE COURT: If he doesn't clear it up then you clear it up later by questioning.

MR. HIRT: All right, fine.

THE COURT: Now, I don't know whether there is an answer or not. I've lost the thread of the whole thing.

MR. GILDIN: Why don't I just ask it again, maybe that would be best.

THE COURT: All right.

BY MR. GILDIN:

Q. It's true, sir, that Little Bird of the Snow Roy's name and birth date have been entered on the computer which the United States Department of Health and Human Services and the Pennsylvania Department of Public Welfare use to determine whether or not she is eligible for cash assistance, isn't that right?

A. Portions of the name, at least. A name that long, I'm not—I'm almost certain that nothing—no computer—I shouldn't say no computer—I'm sure the Pennsylvania [37] Department—I know the Pennsylvania Department of Public Welfare's computer doesn't have room for the whole first name; and it is Pennsylvania Department of Public Welfare's computer.

Q. Do you know whether or not there is any more—more than one individual who has the same portions of the name, Little Bird of the Snow Roy, entered on the computer as you have described it?

A. I don't know.

Q. Did you ever bother checking that?

A. No, I haven't.

Q. Anyone ever ask you to check whether that was true?

A. No.

Q. And do you know whether there would be any—I gather, then, you would not know whether anyone with those same portions of the name, Little Bird of the Snow Roy, would also have her same birth date of December 26, 1980, would you?

A. No, I don't know that.

Q. Now, the manual describes that as part of this search there is something known as the soundex search on the name done, is that right?

A. This search, this weighted search here, this is something similar to soundex, yes.

[38] Q. And that is to make sure that there has been no mistake about the name that has been searched, as I understand it?

A. Name or any other factors.

Q. And so when it says—on the top of page Roman numeral VI-11—that (Reading) A soundex search on name will take place . . . (End of reading), that there is some feature of the system—which I would be the last person to understand—which takes a look to make sure that there was no mistake made based upon commonalities and sounds of names.

A. Yes.

Q. Now, at some point in time—

THE COURT: I would like to inquire about that.

MR. GILDIN: Please do.

THE COURT: Are you saying that a search would be made, for instance, to ascertain whether the name Pfirman, P-f-i-r-m-a-n, if that is the way that the applicant's name was spelled, would there also be a search against F-i-r-m-a-n?

A. Yes, sir.

THE COURT: Okay.

A. Smith and Smyth—

THE COURT: What?

A. Smith and Smyth would be one.

BY MR. GILDIN:

[39] Q. Now, according to this manual, at some point in time someone is going to type into the computer the information that has been gathered on the welfare applicant, is that correct?

A. Yes, I mean, it depends on the state.

Q. Well, does Pennsylvania put the information in on the applicant into this computer?

A. Yes.

Q. And as a safeguard against error, the computer is going to edit the information on the applicant, is that right?

A. That's correct.

Q. Now, according to this manual there are three different types of errors, is that correct?

A. According to the manual, correct.

Q. And looking at page Roman numeral VI-21, the first type is which they logically call a Type #1—I'm sorry, it must be on page VI-20, I'm sorry—what they refer to as a Type #1 error, is that correct?

A. That's what—if that is what the manual says, yes.

Q. And these are the worst kind of errors or what they refer to as vital errors, right?

A. That's what the manual says.

Q. And if there is one of these Type #1 errors that's [40] placed into the computer, at that point the computer will not accept the information, is that right?

A. That's correct.

Q. It will not be able to search whether the applicant is eligible, is that correct?

A. Correct.

Q. And it won't determine how much money they're entitled to, right?

A. (Witness nods in the affirmative.)

Q. Right? You are nodding your head yes.

A. Yes.

Q. And it won't authorize issuance of a check, will it?

A. Yes, it won't authorize issuance of the check.

Q. And the absence of a social security number is not a Type #1 error according to this manual, is it?

A. Yeah—I don't know. I would have to see—to be honest with you, I don't know at this point.

Q. But in their description on page Roman numeral VI-21, the first full paragraph, the last line says, (Reading) The following errors establish a core to which other Type #1 errors can be added: (End of reading.)

THE COURT: Counsel, I don't follow that.

MR. GILDEN: I'm sorry, Your Honor.

THE COURT: Page VI-20?

[41] MR. GILDIN: VI-21 now.

THE COURT: Oh, all right.

MR. GILDIN: What is actually the first full paragraph beginning with the words "It should . . .", the last line of that paragraph, Your Honor, the last line begins—right above those five little circles in the middle of the page.

BY MR. GILDIN:

Q. It says, (Reading) The following errors establish a core to which other Type #1 errors can be added: (End of reading.)

THE COURT: All right.

BY MR. GILDIN:

Q. And in those five little dots where they describe the core of Type #1 errors, nothing there states absence of a social security number, does it?

A. This is the update module. It has nothing to do with—there is an add module also. The update module would be someone that is already on the file.

Q. Sir, if you turn to page Roman numeral VI-19, this is entitled "Eligibility Module", correct?

A. That is correct. That's not—

Q. This is where—

MR. HIRT: I think he was trying to finish an answer.

[42] THE COURT: Well, I didn't know there was any question other than the one relating to eligibility module. So I'll overrule the objection.

You may go ahead.

BY MR. GILDIN:

Q. Now, is a second type of error known as the—

THE COURT: Well, wait a minute. You went back to 19, I thought you were going to pick something up from 12.

MR. GILDIN: I'm sorry, Your Honor, I thought he answered the question. You told me to go on; I misunderstood that.

THE COURT: All right. Well, it's conceivable that the objection threw me off so I've got to have that question read back because I don't know what is on 19 that is—

MR. GILDIN: Your Honor, why don't I clarify that instead of having the reporter look for that?

THE COURT: All right.

BY MR. GILDIN:

Q. On the top of page Roman VI-19 it notes that this is the eligibility module that the system goes into, correct?

A. Yes, that's correct.

Q. And this description of the errors is described within this eligibility module, correct?

A. Eligibility determination.

Q. Exactly. So, what we are trying to do now is [43] determine whether or not the person is eligible for benefits.

A. That's what this module is doing.

Q. Now, going back over onto page Roman numeral VI-21, it describes a second type of error that the computer will edit, is that right?

A. Correct.

Q. And if it's a Type #2 error the computer will determine whether or not the applicant is eligible, but will not issue—will not determine the amount of the grant and will not authorize payment of the check, is that right?

A. That's correct.

Q. And the manual then goes on to describe the certain Type #2 errors, is that right?

A. That's correct.

Q. And there is nothing in there, that description on pages Roman numeral VI-21 through Roman numeral VI-23 that describe the absence of a social security number as a Type #2 error, is that correct?

A. That's correct.

Q. Then there is a third kind of error described on page Roman numeral VI-23 known, logically, as a Type #3 error, is that right?

A. Correct.

Q. And if there is one of these errors in the case, the computer still will determine whether or not the [44] applicant is eligible, correct?

A. Correct.

Q. And it will, in fact, unlike the other errors, go on to calculate the amount to which the person is eligible, is that right?

A. That's correct.

Q. And in fact it will authorize the system to issue the welfare check, is that right?

A. Correct.

Q. Now, under Type #3 errors on page VI-23, the fifth little dot or circle there states, (Reading) Invalid social security number data—For all active persons, social security number must not be blank. (End of reading.) Is that right?

A. That's correct.

Q. So if someone—if the applicant does not have a social security number, that is a Type #3 error, isn't it?

A. That's in this particular system.

Q. Right. And under this particular system the computer will still determine whether or not they are eligible, will still calculate the amount of the grant and will still authorize the payment of that check, isn't that correct?

A. That's correct.

Q. And then, as over on page Roman numeral VI-25—[49] What is your view on that?

A. Sir, I believe that the intake portion, which is prior to the eligibility determination portion, is where most—there is a whole module in this system on social security number and the controlling of the social security number.

The reason that blanks are left is because if you do not have a social security number when you apply for Aid to Family with Dependent Children, you have to at least apply for a number through filling out a social security form called an SS-5. And there is an indicator set on the file to follow up, sir, to ensure that that number is received.

So therefore, theoretically, you can start receiving welfare or Aid to Family with Dependent Children without having a number immediately. But you must have applied for the number. That is what the law is, it's not that you have a number; you must either have the number or apply for a number.

BY MR. GILDIN:

Q. Mr. Stauffer, if someone applied for a number, they would not have a social security number to put into the file that this computer would search, correct?

A. That's correct.

Q. And that would be a blank social security number, correct?

A. That's correct.

[50] Q. And that would be a Type #3 error, correct?

A. Well, it could be a blank and it could be a dummy social security number. They could have put something in there other than that to—and indicator that an SS-5, an application for social security has been applied for.

Q. But if they put nothing in there, that would be a blank social security number.

A. That's correct.

Q. And that, according to this system, is a Type #3 error that has no effect on the ability to determine eligibility, calculate the grant or issue the warrant, correct?

A. On this example, yes.

Q. So, under the system at least described in this manual, if Little Bird of the Snow Roy had social—had no social security number, it would be a Type #3 error.

A. I can't answer that.

MR. HIRT: Objection. Based upon the witness's testimony, she would have had to have applied for a social security number, which obviously is not the fact in this situation.

MR. GILDIN: Your Honor, the question was whether—if, in her record that they put into the system there was no information in her social security number box, it would be a Type #3 error, not whether she applied. I'm asking about the [51] space on the form for the number.

THE COURT: All right, I'll overrule the objection. The witness already answered, he said he couldn't answer. Right?

A. I can't answer that because I believe it's another part of the—the intake module. You have taken this system and taken pieces out of it.

There is another portion of the system that controls social security number.

BY MR. GILDIN:

Q. That is the intake portion.

A. Intake and there is an enumeration module, enumeration standing for social security.

Q. Is that the SSN verification module?

A. It probably is.

Q. Well, we'll get to that one in a little bit.

THE COURT: Now, I couldn't tell whether you used the word enumeration or numeration, and they are very different concepts. Which?

A. Enumeration, sir.

THE COURT: Okay.

Numeration is doing what I did the other day, reading off numbers and actually making words out of them.

BY MR. GILDIN:

Q. Now, after this information—according to this [52] manual, after this information is entered into the computer and the errors edited, over on page Roman numeral VI-25 right at the top of the page it states that, (Reading) An intrajurisdictional verification is processed by the system in the same manner as discussed previously (under 1-05). (End of reading.) Right?

A. Yes, that's what it says.

Q. And if we look back to page Roman numeral VI-9 where that 1-05 is referenced, it describes that same intrajurisdictional verification inquiry that we talked about the caseworker doing in the first instance, doesn't it?

A. That's correct.

Q. And it has, as far as the factors to be searched, the very same factors of last name, first name, middle initial—turning the page—county of service, birth date by month, day and year, sex, race and social security number, correct?

A. That's correct.

Q. So really, the computer now does the same search that this system described the caseworker asking the computer to do in the first instance, correct?

A. That's correct.

Q. And the reason, as stated back over on page Roman numeral VI-25, again under 5-05A, the second line (Reading) The intrajurisdictional search is done by the system again in [53] the eligibility module to insure that the AFDC caseworker has executed this step of the process. (End of reading.) Right?

A. That's correct.

Q. And again, while the social security number may be a part of that inquiry, it's certainly not required to do that intrajurisdictional search, isn't that right?

A. Again, it's a weight factor. No one particular data element is—they would still do the inquiry for the match.

Q. I'm sorry. Excuse me, did you finish?

A. Yes.

Q. If there was no number it would just come up with a negative match value for that number, correct?

A. Correct.

Q. But it still could get the positive values that we talked about for the name and the birth date and the other factors, right?

A. Correct.

Q. Now, up to this point in the process, all we've been talking about is the system looking at the state's own Aid to Family with Dependent Children files, correct? The intrajurisdictional search.

A. I'm sorry, could you repeat it?

Q. Yes, I would be happy to.

Thus far the process we have described is one [54] whereby the state is looking at information first of all, only in the files of that state, and only in the files within the Aid to Families with Dependent Children file, correct?

A. This book, that's all it talks about, right.

Q. And you talked about that the system is designed then, after making these eligibility determinations, to go into the verification of the information it got out of the AFD—Aid to Family with Dependent Children files, correct?

A. Correct.

Q. And you are going to want to take a look at what information do we have on the applicant in the federal government files, isn't that right?

A. That's one of them.

Q. And under this system described in this manual at Roman numeral VI-48, they call that the federal verification module, is that right?

A. That's what they call it, yes.

Q. And what this means is we're going to take a look at what information we have about this applicant in certain federal government files, is that right?

A. Correct.

THE COURT: Well, I don't know what a module is. I don't know whether it's a piece of equipment, whether it's a program or whether it's—I just simply don't know what a module is. What is that?—

[55] A. A module is a small portion of the system, such as eligibility determination was a module of the system, of the total system.

THE COURT: Well, is it a physical item?

A. No, it's a set of programs. They're a group of programs.

THE COURT: All right.

Well, can it properly be called software?

A. It's a group of software.

THE COURT: All right.

BY MR. GILDIN:

Q. And in simple terms, sir, it's my understanding that we are going to use this same sort of matching procedure to do this search, isn't that right?

A. This type of search, the federal verification search, is different than what we went through just prior to this.

Q. But on a very general level the concept is the same, that is, we are going to take information from our state Aid to Families with Dependent Children files and say to the federal computer, here is the information on the applicant, look at these factors to find out what information your system has on this person.

A. Correct.

Q. And the computer is going to search all those [56] different factors, just like it did in the intrajurisdictional search, right?

A. Yes.

Q. And one of the files that is going to be searched in the federal government is what is known—as indicated on the bottom of Roman numeral VI-48 under 9-03—the beneficiary and earnings data exchange, is that right?

A. Yes.

Q. Is that the thing you described where you look to see if a person is getting railroad retirement benefits and black lung benefits and old age benefits?

A. Survivor's benefits, yes. Earnings indicate W-2 benefits too, just to clarify. Beneficiary is the one you just described. Earnings is basically the W-2 information.

Q. Thank you.

Now, this computer system will decide which cases need to go into this federal verification, correct.

A. That's correct.

Q. And on page VI-48 it identifies, under 9-01, certain criteria by which this computer will make up its mind as to which sorts of cases do we need to make this federal search on, correct?

A. That's correct.

Q. And if you look at the third of the criteria set forth there, is blank social security number, correct?

[57] A. Correct.

Q. So the absence of a social security number does not prevent the system from performing this federal verification inquiry, does it?

A. That's one of the purposes of it, is to find out if they—to get them—to find out about blank social security numbers.

Q. Exactly. So rather than blocking the system from doing the federal verification inquiry, one of the things this computer is alerted to is that if someone doesn't have a social security number that is one of the cases we ought to be searching the federal files on, correct?

A. Well, there is a particular module—there is a particular follow-up to—if the client does not, once they get their social security number, does not bring it in to give it to the caseworker, there is a mechanism for the system to follow up for the client.

Q. I understand that, but that is not my question.

We're asking about under what circumstances this sytem has the capacity to do the search of the federal files and whether you need to have a social security number to perform that search.

As I read this manual, one of the reasons a case is selected for the doing of this federal search is because to date there is no social security number, isn't that [58] correct?

MR. HIRT: Your Honor, I think he is again testifying as to what he thinks the manual means; and I think the witness was trying to explain in his prior answer how to construe that manual.

I don't think that is a proper question for this witness.

THE COURT: What is your view?

MR. GILDIN: Your Honor, I stand on that question as posed.

THE COURT: All right. I'm going to sustain the objection. We have just simply got to have questions asked of this witness. You can have him read 9-01, the first paragraph and the line if you wish to, but I'll tell you, it is difficult for me to grasp it when it comes from counsel and the question is is it correct. So I think it's very important that counsel ask a question and I can follow along and it's much better for me than the way it's being done.

MR. GILDIN: Okay. Thank you, Your Honor.

BY MR. GILDIN:

Q. Page VI-48, Mr. Stauffer, that's entitled "Federal Verification Module," 9-01 reads as follows, doesn't it, (Reading) The federal verification module will select cases for federal and state verification using criteria based, such as the following: (End of [59] reading.) And there is a list of criteria, the third one on the list is (Reading) blank social security number (End of reading.) Isn't that right?

A. Yes.

Q. So the system can conduct a search—can the system then conduct a search of the federal files without receiving from the state the welfare recipient's social security number?

A. It can match one particular federal file which is the outstanding social security number applications. It cannot search the beneficiary earnings' kinds of file. It can only search that one file to follow up on. It cannot search the rest of them.

Can I have one more clarification? The federal verification—the purpose of this module is, it's to do one

verification rather than half a dozen. In other words, put all the information on one file or one tape and send it to social security and then they would spin off and do a beneficiary and earnings match against certain kinds of records and they would follow up on social security numbers, on another type of a record.

It's really for efficiency rather than setting up five different files because five files could get lost in the mail, or five files could—it's just, it's much more cost effective to do it this way.

[60] Q. Sir, I believe you testified that the intrajurisdictional search could be done without the social security number, correct?

A. To a limited extent, yes.

Q. And the request for the federal search can be done without the social security number, correct?

A. This particular one.

Q. Now, after the federal search is done, looking at page Roman numeral VI-50 right above the words "State Verification Module", it states, (Reading) The results of the exchange are sent to the state verification module. (End of reading.) Correct?

A. Correct.

Q. So after this—is it true then that after this federal search is done the results of it are sent back to the state, is that correct?

A. Correct.

Q. And then, still on page VI-50 Roman numeral 10-1, (Reading) The state verification module will merge all of the data received from the federal verification module and establish one format for processing. (End of reading.)

A. Correct, for efficiency, as I described on the, on the way back of the file that was sent out is sent back.

Q. And then the last line of 10-1 says, (Reading) This verified federal file will be created and matched [61] against the AFC (sic.) data base—and I'll slow down and go to 10-2—for an intrajurisdictional search and match . . . (End of reading.) Is that right?

A. Correct.

Q. So, it takes the data—does it take then the information that it gets from the federal file and then say, now let's compare it again to this state's AFDC file?

A. Correct.

Q. And the way it does this intrajurisdictional search is described in 10-2, Mr. Stauffer, and if you would refer to that again, it says, (Reading) The intrajurisdictional search and match is done in the same manner as in (1-05) with the exception that it is a computer initiated rather than by an inquiry. (End of reading.) Is that right?

A. What it does—that's what it says. If you want to know what it does, I can—

Q. And if we go back to take a look at what this search done as in 1-05, we go back once again to page Roman numeral VI-9.

A. If I could—

Q. Okay. And it describes this matching process as again, taking the last name, the first name, the middle initial, county of service, birth date, sex, race and social security number, correct?

[62] A. Only as a key. Only as to link it back to the correct record. It takes—it does not—that way, because of that new information such as a social security number or new federal or state benefits, they would not match.

Q. But it does, as far as the way the machine matches, is it looks for not only the social security number, but all of this other information.

A. Looks at one key. As far as it's concerned, it's not—it's doing a completely different kind of a match than it did to select the cases.

Q. Well, 10-2 says, (Reading) The intrajurisdictional search and match is done in the same manner as in 1-05 . . . (End of reading.) Doesn't it say that?

A. It says, "the results stored for later reporting".

Q. I'm reading right after what you read there, the second sentence on page Roman numeral VI-50, 10-2.

A. Yeah, I mean, that is what it says, but I'm telling you what it means.

Q. I'm reading the next line. (Reading) The intrajurisdictional search and match is done in the same manner as in

(1-66) with the exception that it is computer initiated rather than by inquiry. (End of reading.) Right?

A. Yes.

MR. HIRT: Your Honor, I don't know what the purpose of this is. Is he trying to impeach him through an [63] inconsistent statement or is he trying to ask the witness for an explanation of what the term means? I'm at a loss to know the relevance of this particular question.

MR. GILDIN: Your Honor, I'm trying to get this witness—I'm not trying to get this witness—I'm trying to explain what this system, as described in the manual, does with respect to the manner of searching.

He has talked about how it can't—it's a different sort of search, and the manual itself states expressly that at this level we are still doing the search in the same way we did that initial one, which was not just looking for a social security number but trying to match on as many of these factors as possible one of which is the social security number, but it's one of many.

THE COURT: Well, I thought the question was merely a reading in of that sentence. So I'll have to have it read back to me. I apparently missed something.

(Question read.)

THE COURT: Well, it seems to me that my first reaction was correct, that counsel has merely read the sentence and I don't know what the "correct" means myself, so I'm going to sustain the objection.

BY MR. GILDIN:

Q. Mr. Stauffer, is it correct that according to the manual, as indicated on page VI-50, after receiving the [64] results of the federal search the computer goes back and checks what data the system has on the applicant in the Aid to Family to Dependent Children within the state?

A. Yes.

Q. And does it indicate that that verification will be done by a matching procedure which was the same matching procedure that was done the first time we described it when the caseworker asked the computer to search it?

A. That's what it says, yes.

Q. 10-3, sir, provides that (Reading) A decision will be made to determine those records that have social security

number verified for all recipients and applicants. (End of reading.) Does that mean that the computer now, even at this stage, is still looking to find out whether everyone has a social security number?

A. No, it's talking about verifying the social security number. It's not—verifying is not whether one has one or not; verifying is whether it's a valid number.

There is, you know—it's one of those, when they—valid against the social security files, because anyone could make up a number; and what social security does is validate that that number is, in fact, that particular client's number by using, you know—verifying it not only against the number, but other identifying factors.

Q. Sir, if the applicant did not have a social [65] security number the federal verification would report that there is no number in its system, wouldn't it?

A. If it doesn't have a number?

Q. If the applicant did not have a social security number and the system did that federal search based upon the notion of blank social security number, the federal computer would report back that we don't have a number for his person either, wouldn't it?

A. I don't even believe—blanks can't be verified, obviously, so I don't believe that would even be spun off and done against verify.

Q. Well, let's go back a step. VI-48. The system, as described in this manual, picks out cases for federal verification based upon, as a criteria, the fact that to this point there is no social security number, doesn't it?

A. That's correct.

Q. So one purpose of this federal verification is to find out, do we have any information on this person with no social security number, is that right?

A. That's correct.

Q. And if that search said, you know when we looked in our federal information bank we don't have a social security number either for the person, it would report that back to the state system, wouldn't it?

A. I don't think so. I think, again, there is many— [66] this federal verification module has many uses and one is to

verify numbers, another is to follow up and see whether there has been—see whether, what happened to that social security number application.

I don't remember the details, you know. You may be correct, but again, I would have to go back and review this document.

Q. You don't remember the details of what—how this federal search is done as stated?

A. Exactly what happens to a blank social security, no. I know there is a follow-up system to get the number, but—

Q. Or a follow-up system to report that someone needs to apply for a number, wouldn't that be right?

A. Well, basically what happens is that the tapes get sent back to the state with the numbers on it. And they do not use—they do not use—what they use is a case number and everything is keyed off the case number. Without that case number, if that number was issued, you would never find it because—

Q. We are talking here, sir, about the social security number.

Certainly one of the reasons they pick these cases to have a federal search done is because there is no social security number in the file, isn't that right?

[67] A. Again, that's one of the reasons, because—

Q. And certainly the federal computer does something with this data, but you don't know the details of what is done in those cases.

A. It does not—it does not verify—it does not match against social security for the number, it matches against the case number.

Q. So it still does a search of the federal files, but it's not going to try to match the social security number, it's got to use other information for the match.

A. Case number, exactly.

Q. And after doing that search, it sends the results of the search back to the state, is that correct?

A. That's correct.

Q. Back then to Roman numeral VI-50. We are now back to the state, in what is referred to there as the state verification module, correct?

A. Correct.

Q. And as we've already been through, just to get us back to the point we had left off, that there is going to be another one of these intrajurisdictional searches performed with the information we receive back from the federal government, correct?

A. Correct.

Q. And as we have just been through under 10-2, we're [68] going to use a matching—the computer will use a matching procedure done in the same manner as that first match that was described in section 1-06, isn't it?

A. That's what the book says, correct.

Q. And that match is done not solely with social security numbers, but with the variety of factors set forth in 1-06, isn't that right?

A. That's what the book says.

Q. And then after that match, under 10-3 on page VI-80, the manual provides, (Reading) A decision will be made to determine those records that have social security number verified for all recipients and applicants. If it is found that the SSN is not verified then the case will be sent to the SSN verification module which will be detailed later. (End of reading.)

Does that mean that if you get information back from the federal verification that says that we can't verify a social security number, this computer sends it over to a new set of functions?

A. Yes.

Q. And that's known as, in this system, as the SSN verification module, is that right?

A. Correct.

Q. If you turn please to page Roman numeral VI-80. And that is entitled "SSN Verification Module", isn't it?

[69] A. Yes.

Q. Right at 25-01, are you with me there, sir?

A. Yes.

Q. That reads, (Reading) The SSN verification module is entered from the state verification module when it has been determined that the social security number has not been

verified by the federal verification module for all recipients involved in the case. (End of reading.)

A. Correct.

Q. Does this mean that if, after this federal search, it's reported that we don't have a social security number verified for this person, the system is going to then move that information over into what it calls the SSN verification module?

A. Correct.

Q. Now, what this module does is described on page VI-61. Reading at 25-02. (Reading) If there are recipients within the case that have not submitted SS-5s, then a notification to produce an SS-5 for the recipients will be forwarded to the AFDC caseworker. (End of reading.)

Now sir, is an SS-5 the application for a social security number?

A. Correct.

Q. So the only way you would get to this SSN verification module is after doing all of these searches, the [70] intrajurisdictional search and then we go up into the federal system and come back to the state system, it may well be that they find that there is someone not only who doesn't have a social security number, but who hasn't even applied for one, correct?

A. Yeah, it's a follow-up, this is.

Q. And what this system will do, in 25-02, will automatically send a notification to the caseworker that you haven't—there is no record that anyone has applied for the number.

A. That's what the social security files have.

Q. And then the next thing that happens is 25-03, (Reading) The AFDC data base and the WIN/Title IV-D control data base will be updated for follow-up on the notifications that were sent to the AFDC caseworker. (End of reading.)

Now, to explain some of these terms, the AFDC data base is the one we've been talking about with respect to this intrajurisdictional search, right? That state's own Aid to Families with Dependent Children files, correct?

A. Correct.

Q. And that WIN file, that's the Work Incentive program file, is that right?

A. Right.

Q. And that's the program where you have to be sixteen years old and register for the program, right?

[71] A. Correct.

Q. And that Title IV-D program that's described there, that's the child support program, it's my understanding?

A. Yes.

Q. And that's if there is a parent not living in the home, the system wants to make sure that it's either looking for that parent or that parent is providing the support that's required.

A. Correct.

Q. Of course, in this case neither the—under the facts of this case, I'm sorry, Little Bird of the Snow is not going to be in this WIN program for thirteen years, right?

A. Yes, based on the facts.

Q. And based upon the facts of this case, both parents are, in fact, living with Little Bird of the Snow in the home so that the Title IV-D process doesn't apply to the facts of this case.

A. That's the way it is right now.

THE COURT: Wait a minute, go ahead.

MR. HIRT: I want to make sure that my objection is noted that at the present point in time on May 21, 1984 this family happens to be together, that says nothing about the future.

A. That was my point.

[72] THE COURT: Wait. I don't know whether that's an objection or what.

MR. HIRT: Well, it's an objection because counsel's question goes to the facts of this case and I want to make sure that the facts of this case at this moment in time, not as the facts of this case as the defendant views them.

MR. GILDIN: Your Honor, I believe that the witness answered before the objection and stated that very fact, at this point in time and we accept that answer, Your Honor, we have no problem.

THE COURT: All right.

BY MR. GILDIN:

Q. Now, after these functions are done, the last line on VI-81 says, (Reading) Then system control returns to the state verification module. (End of reading.) So, is it correct that after these notifications are made the system goes then back and says go on with the state verification module, correct?

A. That's a follow-up. Yeah, after these follow-up notifications, yeah, it goes back.

Q. And then what will happen is that the system will do the verification of state files other than the Aid to Family with Dependent Children files, correct?

A. Yes.

[73] Q. And this is where you talked about that there is this third party verification within the state where it's going to look at birth records and it may look at death certificates and it may look at motor vehicle registrations; it's looking at files within the state other than the Aid to Family with Dependent Children program.

A. Correct.

Q. And it does this by a system of matches in the same fashion generally as we have been describing, correct?

A. Generally.

Q. A few more things about this system as described in this manual, sir.

It is the aim—is it the aim to make sure that in every welfare office there are some personnel who are trained in the operation of this system?

A. Depends on the state.

Q. Sir, if I could call your attention to page Roman numeral VI-4 under "Document Control Unit", right before that first dot there. Are you with me?

A. That's correct.

Q. It says, (Reading) Staffing recommendations are as follows: (End of reading.) Do you see that portion?

A. Yes.

Q. And this is where this system is going to describe what personnel it recommends having at each local office, is [74] that correct?

A. Correct.

Q. Okay. It reads, (Reading) Staffing recommendations are as follows:—the first little dot—One data processing coordinator per local office. (End of reading.) Correct?

A. That's correct.

Q. Now, over on page Roman numeral VI-5, this manual describes the duties of the data processing coordinator, again, looking below the set of dots on Roman numeral VI-5—are you with me, sir?

A. Correct.

Q. It says, (Reading) The data processing coordinator is responsible for the supervision of document control unit staff, liaison with AFDC unit personnel and central staff and overall operations of the document control unit. (End of reading.)

In the next paragraph it states, (Reading) Additional responsibilities include reviewing the case record form and providing technical assistance to AFDC personnel. The DPC—who I believe is the data processing coordinator—will also be responsible for all activities involving the use of computer terminals. (End of reading.)

Is that an accurate description of the responsibilities as contemplated by this system?

[75] A. Yes, that's what the recommendations say.

Q. Now, going back to page Roman numeral VI-4, the third little dot down there, as a third staffing recommendation, (Reading) One AFDC systems technician is recommended for every three thousand cases or each local office. (End of reading.) Is that the proper recommendation?

A. That's what it says.

THE COURT: Counsel, I can't find that. Where is that?

MR. GILDIN: Your Honor, we're back on page VI-4, the third one.

THE COURT: I see it.

BY MR. GILDIN:

Q. So at a minimum, according to this particular recommendation, each local office will have at least one of these AFDC systems technicians, it that right?

A. That's what it says, and also has the qualifier of three thousand cases.

Q. Right. With respect to the responsibilities of this person, would you please turn to Roman numeral VI-6, right at the top, sir. (Reading) The AFDC technician in the document control unit is the technical expert on the system. (End of reading.) Is that a correct summary of the duties of this AFDC technician?

[76] MR. HIRT: Your Honor, I want to ask what the relevancy of this line of questioning is. I did not know that we were getting into the individual personnel system of a particular state's Department of Public Welfare. I don't know what the relevancy of this line of inquiry is.

THE COURT: How is it relevant, counsel?

MR. GILDIN: Your Honor, it's relevant in terms of whether, if a modification had to be made to this system, that there would be capable personnel in the local welfare office to do it. And I've got just one other type of person to describe, based upon their duties in this particular manual and then we'll end that line of inquiry.

THE COURT: Well, it doesn't seem to me whether there is personnel to do it or not is relevant. If we tell them they've got to do it, they are going to have to do it, that's all, it doesn't make any difference what's in this manual.

MR. GILDIN: I believe, Your Honor, it's relevant to whether if such an order issues, we'll have to suddenly come up with trained personnel who wouldn't otherwise be in the office.

THE COURT: I have not heard that as a defense. I think this is anticipatory rebuttal, so I'll sustain the objection.

MR. GILDIN: Thank you.

[77] BY MR. GILDIN:

Q. Mr. Stauffer, if my recollection serves me correctly, on Friday you talked about the notion that there are certain error e-r-r-o-r rates that the states must not exceed, is that right?

A. That's correct.

Q. And the system—the Aid to Family with Dependent Children system, would certainly prefer that no mistakes are made in payment, isn't that right?

A. That's one of the types of errors.

Q. And would you really—the goal is to minimize, to the extent possible, payments to persons who are ineligible, right?

A. Payments and technical errors also count just as much.

Q. To you they count just as much, right?

A. And the quality control.

Q. And you're also concerned that people are not, who—while eligible—are not paid more than they're entitled to, isn't that correct?

A. That is one of the things we're concerned about.

Q. But while you would like to be perfect, the system in fact has proven that it's not capable of perfection in these regards, correct?

MR. HIRT: Your Honor, I don't think that the [78] witness has had any testimony in my direct about the perfection or nonperfection of the system. This is outside of the scope of my direct.

THE COURT: What is your view, counsel?

MR. GILDIN: Your Honor, he has testified to an error rate. We are trying to get into what it means that there is an acceptable or a desired error rate, and the foundation of that understanding.

THE COURT: Well, I'm troubled by that. How is the error rate of importance to us?

THE GILDIN: Your Honor, this witness has testified that goals are set with respect to the states. That a certain—that there must not be errors over a certain percentage. And he testified on direct examination that with respect to payments to ineligible persons, I believe, that the states must not exceed four percent, that is, their overpayment in dollars must not be more than four percent of the total dollars awarded to welfare recipients.

We're going to demonstrate, Your Honor, as to how much money was paid to welfare recipients, what percentage of that is four percent, and how much the risk of error is with respect to payments to Little Bird of the Snow Roy if, for some reason, they could do no verification whatsoever.

The legal standard, Your Honor, with respect to the case before this Court, is what effect is it going to [79] have with respect to exempting Little Bird of the Snow Roy from the

social security requirement. We believe we have amply established that they could do this verification inquiry, but even if they cannot, Your Honor, and even if every dollar that goes to her is not proper, you will find out that the error is miniscule with respect to what this system accepts as an error rate.

MR. HIRT: Your Honor.

THE COURT: All right.

MR. HIRT: I'm sorry to interrupt, but I wanted to enjoin that what Mr. gildin's legal claims are have nothing to do with my question, which is: How do these questions have any role with the direct of my witness and his saying that there is a certain error rate.

What is more, I have the impression Mr. Gildin intends to introduce some rebuttal evidence by some sort of statistical means, and I certainly don't know how he's going to do that in terms of the case as I understand it.

But my limited objection is the fact that Mr. Stauffer has said that Department of Health and Human Services has established a certain error rate and they would like the states to go under that, has nothing to with the perfection or imperfection of the system, or in fact what Mr. Gildin is now trying to get into a whole line of inquriy as to the cost of an error as to this particular household.

[80] THE COURT: All right. Well, I don't see the relevancy of it so I'm going sustain the objection.

We are now four minutes beyond the time you thought it was going to take to finish this cross examination. It's four minutes after 11. We have been in here over an hour and a half and we simply should take a recess. We will take ten minutes. (Brief recess.)

MR. GILDIN: May we appraoch side bar, Your Honor?

THE COURT: Yes, sir. (Side Bar Conference:)

MR. GILDIN: At this point I would like to make an offer of proof with respect to the evidence concerning the error rate that I would have hoped to elicit from this witness.

THE COURT: All right.

MR. GILDIN: Your Honor, on direct examination he testified that the goal of the —rather, that the states are required to establish an error rate not to exceed four percent,

and should it go over four percent that there is some reduction in federal funding. This is confirmed at 45 Code of Federal Regulations, Section 205.42, Your Honor.

The affidavit of Mr. Factor, which this witness agreed that he reviewed in preparation for his testimony and which was provided in support of the federal defendants' [81] summary judgment motion, states at paragraph three, that in fiscal year of 1981, Six billion nine hundred twenty-eight million dollars were expended for payments to recipients of Aid to Family with Dependent Children program.

If one took four percent of the amount of federal funds expended in fiscal year 1981, which is the error rate figure, that would allow the system to accept, under their standards, an error rate—by my calculations—of Two hundred seventy-seven million one hundred twenty thousand dollars. Little Bird of the Snow is currently receiving payments of $66 a month, which results in an annual payment of Seven hundred ninety-two dollars per year.

And if one takes what percentage of this close to Seven billion dollar figure payments to her represent, by my arithmetic, which I hope is correct, Your Honor, is that payments to Little Bird of the Snow, based upon the federal payments in fiscal year of 1981, represent one-one hundred thousandths of one percent of the payments to the system.

That would have been the evidence—that would be the evidence that we would have hoped to have elicited through the cross examination and that concludes our offer of proof.

THE COURT: All right. Do you persist in your objection?

MR. HIRT: Well, Your Honor, I persist in the [82] objection because—

THE COURT: All right, that's enough as far as I'm concerned. If you want to put additional reasons on, which you haven't stated before, that's fine.

MR. HIRT: Well, I do have one other point now that I have a feeling—now that counsel has done his arithmetic. Which is, that I don't understand the relevance of the financial outlay that's incorporated into the possible fraud or mispayment as to Little Bird of the Snow. Obviously it's just one individual in the system.

I mean obviously one can't have a fraud that's greater than the potential fraud based upon the eligibility of that person. So I don't understand the relevance of the fact that only a certain dollar amount would be attributed to fraud by this individual person.

THE COURT: All right. What did you want to say, Mr. Ressler?

MR. RESSLER: Your Honor, I simply wanted to point out that first of all, the figure that was quoted by Mr. Gildin applies to the nation as a whole, when he puts it at Six billion dollars. The error rate keys on a particular state, so Mr. Gildin's arithmetic is incorrect because we are not dealing with the national error rate, we are dealing with Pennsylvania's error rate.

Second, unless Mr. Gildin is going to put on proof [83] with respect to Pennsylvania's error rate notwithstanding Little Bird of the Snow, we actually don't know if adding Little Bird of the Snow in would put Pennsylvania over the top. And I think that would be the crucial question with respect to whether the state is being penalized. Of course, that's all rather speculative because the error rate is going to fluctuate from month to month.

THE COURT: Well, we have their offer of proof. It's my view that, at best, this is immaterial. But I still have great question as to whether it's relevant. I don't think it is, that is one reason for the ruling, and the other is that counsel did represent he was going to finish his cross examination of this witness by 11 o'clock and that hasn't happened; and I'm willing to grant him some further time to interrogate this witness, but I think in the interest of saving time we have got to stop somewhere or else we're not going to finish this case tomorrow afternoon.

I'm very sorry that we are under this time pressure, but I don't think Mr. Ressler could reasonably have been expected to have foreseen this case would be going on on Wednesday when he made the reservations for his vacation.

MR. GILDIN: Thank you, Your Honor. (End of Side Bar Conference.)

BY MR. GILDIN:

Q. Now Mr. Stauffer, it's true that—isn't it true [84] that Little Bird of the Snow Roy, in fact, received cash assistance without a social security number from January 1st of 1982 until September 17th of 1982?

MR. HIRT: Your Honor, I object on relevance grounds.

THE COURT: What is your view, counsel?

MR. GILDIN: Your Honor, if the issue in this case is whether the system can function without a social security number for all applicants, indeed she received the benefits for nine months without such a number.

THE COURT: All right. We'll overrule the objection.

A. I can only assume by the facts in the case. I have never seen that in writing.

BY MR. GILDIN:

Q. Well, it is undisputed, and that's the reason we're here, that Little Bird of the Snow does not have a social security number, correct?

A. That's my understanding, yes.

Q. Paragraph thirteen of the Comprehensive Statement of Undisputed Facts, (Reading) On January 1, 1982, Stephen J. Roy began receiving cash assistance and medical assistance for himself and his two daughters, Renee and Little Bird of the Snow. (End of reading.) That indicates that as of January 1, 1982, Little Bird of the Snow Roy began to receive [85] cash assistance without the number, correct?

A. Correct.

Q. Now, stipulated paragraph eighteen, (Reading) On September 17, 1982, Mr. Roy's cash assistance under Aid to Families with Dependent children was reduced because DPW held Little Bird of the Snow ineligible for benefits.

If the benefits were terminated on September 17th of '82, that would certainly indicate, sir, that for the nine-month period—she did receive those for nine months, correct?

A. That's what the document—

Q. And that she did not have a social security number in that period of time.

A. Yeah, she didn't have a social security number. I assume she didn't then, she never had one.

Q. Now, before the United States Department—strike that, please.

Your department, the United States Department of Health and Human Services, was formerly known as the United States Department of Health, Education and Welfare, correct?

A. Correct.

Q. And that department has already been ordered, on a prior occasion, to continue welfare benefits to at least one recipient who refused to provide a social security number on religious grounds, didn't it?

[96] MR. HIRT: Your Honor, is this impeachment or is this directed to some relevant inquiry?

THE COURT: Well—

MR. HIRT: The witness—

THE COURT: You are putting this by way of a question. Why don't you object and—

MR. HIRT: I object, first of all, on relevance grounds, which is the fact that a particular court has ordered his department to do a particular thing is certainly irrelevant and I don't understand why this witness is being asked to concur or not concur with that determination.

MR. GILDIN: It's relevant to the ability of this system, as they describe it, to provide benefits without a social security number. And it also may be relevant as to whether they made any modifications to accommodate the Stevens' children or whether, in fact, exempting the Stevens' had any impact on the system.

As Your Honor may be familiar with, in Stevens versus Berger, at 428 Federal Supplement 896, a decision by Judge Weinstein out of the Eastern District of New York in 1977, the United States Department of Health, Education and Welfare was enjoined from terminating welfare benefits to the Stevens' children based upon their religious objections to providing a social security number.

THE COURT: I think it has some bearing. I'll [97] overrule the objection.

BY MR. GILDIN:

Q. Could you read back the question, please? (Question read.)

A. I didn't know that until he read it.

THE COURT: Didn't know that until when, sir?

A. Until he read it just now.

BY MR. GILDIN:

Q. Are you aware of any modifications that your department made to accommodate the Stevens without a social security number for their children?

MR. HIRT: Objection, lack of foundation as proven by the witness's past answer.

THE COURT: Well, I'll overrule the objection. I don't know whether he's aware of it or not. Probably he's not aware of it or he would not have answered the prior question the way he did.

A. No, I'm not aware of it.

BY MR. GILDIN:

Q. Did you ever bother to check what modifications were made for the Stevens?

A. I never even heard of the case.

Q. So no one asked you to check out the fact that on one prior occasion we accommodated someone without requiring them to provide a social security number, correct?

[80] MR. HIRT: Objection, lack of relevance.

THE COURT: All right. Well, I'll overrule the objection.

A. No, I have—

BY MR. GILDIN:

Q. Is there any evidence that the Aid to Families with Dependent Children statutory scheme was made unworkable by exempting the Stevens' children from the social security number requirement?

MR. HIRT: Your Honor, I have an objection. Now I think he is asking the witness, one, for possibly a legal conclusion and second, to determine a statutory scheme with which he's not at least familiar as a lawyer or the draftsman of the statute.

THE COURT: What is your view, sir?

MR. GILDIN: Your Honor, again, I'm entitled to find out, I believe, whether the witness, even if he doesn't know about what modifications were made, has heard anything that we're having some real problems here because we have

exempted the Stevens with respect to the ability of this system to function.

THE COURT: I'll overrule the objection and permit a limited inquiry along this line, although it seems to me that he may not be the proper witness to be—to whom to direct these inquiries.

[89] MR. GILDIN: Thank you, Your Honor. Could you read back the question, please? (Question read.)

A. I don't know anything about the Stevens' case.

BY MR. GILDIN:

Q. The question is, have you—are you aware of any evidence that the Aid to Family with Dependent Children statutory scheme was made unworkable because of the fact of exempting an individual based upon the failure to have a social security number?

A. No.

MR. GILDIN: Your Honor, at this point I have no further cross examination questions of the witness.

I'll apologize for not knowing whether the Court's practice with respect to offering exhibits would be that I should offer it now after I have completed my initial cross examination or if we should wait.

THE COURT: No problem. I think we ought to wait until the witness is—everybody is finished with the witness because they may offer some other exhibits to him and then we can do them all at once.

MR. GILDIN: Thank you, Your Honor.

THE COURT: Now, do you—I thought maybe Mr. Ressler was entitled to ask questions.

MR. RESSLER: Your Honor, I have no questions.

[90] THE COURT: All right, redirect.

REDIRECT EXAMINATION

BY MR. HIRT:

Q. Mr. Stauffer, in terms of your direct testimony that deals with what was marked as Plaintiff's Exhibit 20, did you have a full copy of that document in front of you, and by "that document" I mean the document that you provided to Plaintiff's counsel on Friday when we adjourned?

A. No, I didn't.

MR. HIRT: I would like to have the witness be presented with the entire document, Your Honor.

THE COURT: All right.

BY MR. HIRT:

Q. Mr. Stauffer, I'll probably ask you a series of questions first with the version of Plaintiff's Exhibit 20 that was given you by Plaintiff's counsel, and then I'll probably ask you a series of questions that deal with the entire document, or at least other portions that were not provided to you. But I'll try to start with the document that you have already been looking at in the course of your direct.

Before doing that, Mr. Stauffer, what is the relationship between Plaintiff's Exhibit 20, which is called the Family Assistance Management Information System, and a particular state's operation of the Aid to Families with [91] Dependent Children program?

A. This is a general guideline to outline what a management information system for the Aid to Family with Dependent Children program could look like or would, you know. It's a possible recommendation. There are several different optional ways of doing a couple of different things in the document.

Q. Okay. Do you know who drafted, within the Social Security Administration this is, this Plaintiff's Exhibit 20?

A. It was drafted by the Office of Family Assistance—the individual, you want to know, or the—it was drafted by the Office of Family Assistance.

Q. Okay, fine. Do states follow this document verbatim or do they make variations upon it?

A. Very few states follow this document. They make, you know—currently, anyway.

THE COURT: I didn't get the first part. You said, very few?

A. Very few.

BY MR. HIRT:

Q. What about the state of Pennsylvania?

A. They're following a document that came—that was produced from this. It was called the application—Automated Application Processing and Information Retrieval system.

[92] Q. Well, let me ask you a few questions about Plaintiff's Exhibit 20 in terms of at least what it says and see if we can get some clarification.

I would like to turn first to the page which is Roman numeral II-3, which deals with the objectives portion. Do you have that in front of you?

A. Yes.

Q. Mr. Giblin asked you a question about the role of this system with the food stamp program.

A. Yes.

Q. In terms of the relationship of the system to the food stamp program in Pennsylvania, what is that actual relationship?

A. That system will be integrated with the Aid to Family with Dependent Children and medical assistance system. It will be integrated into one system.

Q. What do you mean by "integrate"?

A. That means when someone is determined eligible for Aid to Family with Dependent Children they would automatically be determined whether they were eligible for medical assistance or food stamps.

Q. Okay. When will this integration take place?

A. Medical assistance integration will take place in late '94, and sometime in '95 will be the integration of food stamps.

[93] Q. Is medical assistance one of these titles that—

A. Title XIX.

Q. Title XIX?

A. Yes.

Q. And what is Title XX?

A. Social services.

Q. What does that mean?

A. That—social services is basically—it's currently now a block grant which means each state only has a certain amount of funds to administer this program.

Social services has to do with, oh, I can't think of an example. It's basically old age kind of benefits. It's basically vocational rehabilitation, those kinds of things. It's more of a service oriented and not—Aid to Family with Dependent Children is cash; food stamps is obviously food coupons; medical assistance is for medical care.

The Title XX system is really included here because at the time this system was written, this system was more of an open-ended type of system where there was really no ceiling on it, federal ceiling on it.

So, it's very little—very few states are pursuing Title XX as part of this system.

Q. Okay. I would like you to turn to the following page, paragraph—page Roman two, page five dealing with [94] "Client Certification Subsystem".

Mr. Giblin asked you about the caseworker accepting information from the client, which I believe is subsection 1(a).

A. Right.

Q. Do you have that in front of you?

What is the—is there a relationship between giving a social security number for eligibility purposes and this system at that point in time?

A. Well, one of the steps in the intake new module is that they must either have a social security number and show proof of verification by showing, say, the social security card, and a Pennsylvania copy of that card is put into the folder, I believe. I should say I know.

If they do not have a social security number, then they must apply for one at that time.

Q. Well, looking at paragraph—looking down below that section where it talks about the eight logistical modules, I see it is A through H.

A. Yes.

Q. And H lists the social security number verification module.

A. Correct.

Q. Now, is there a relationship between that module and this initial client intake?

[95] A. Yes. Basically, all numbers are verified to make sure that the numbers existed, but the basic function of that module is to follow up on blank social security numbers, to make sure that they did eventually get those.

Q. And what do you mean by "blank social security numbers"?

A. Well, when a social security application—social security number application is filled out, in the bottom left-hand

corner is the case number, and the case number is used to link that client back to that case in the file.

So when the number is assigned and the record is sent back to social security, they're able to update the Aid to Family with Dependent Children file.

Q. Let me see if I follow the sequence.

As I understand it, the household comes in to apply for benefits.

A. Correct.

Q. Is this a situation where a member of the household does not have a social security number?

A. Yes.

Q. Okay. And what is done—if I can use the term—with the absence of that social security number? In other words, where does this data go?

A. Well, like I said, the social security—an SS-5 or social security number application is completed with all [96] the necessary information: name, date of birth, sex—I believe race or religion are optional, those two items.

And in the left-hand corner there is something called a welfare identification code or a case—I believe Pennsylvania—I know Pennsylvania uses a case identification number. That is, when that card is then sent to the Social Security Administration as part of the record, it goes in to get that number, that case number is put into the file as an identification when it comes back to Pennsylvania, for this example.

THE COURT: Counsel, I saw you just—you apparently rose and I just saw you as you were seating. I didn't—I was looking at the witness and I caught it out of the corner of my eye. Did you want to object to that question?

MR. GILDIN: No, thank you, Your Honor.

THE COURT: All right.

BY MR. HIRT:

Q. Is the welfare application number that you have mentioned here the same number which you earlier identified as a unique number as to each individual in that household?

A. Yes, what I don't know, quite honestly, is that it may be the household number or case number to link it back to the case.

Q. Okay. Now, does this process that you have just [97] outlined, where an individual lacks a social security number, and the data is sent to the Social Security Administration, does this process have anything to do with whether the household itself is eligible for benefits in terms of a match?

A. On the initial eligibility, as long as they have either a number or filled out the card it would have no impact on eligibility determination.

The impact on eligibility determination is really the ongoing. It's certainly a redetermination time, or redetermination to define it means reapplication that they must do every six months. If they didn't have a number at that time they would then have to, you know, be declared ineligible.

Q. Directing your attention to Roman numeral two, page eight, I think Mr. Gildin asked you to read from the bottom paragraph that talks about states having specialized problems unique unto themselves.

Do you know whether this language has anything to do with whether or not states use social security numbers?

A. It has nothing to do with social security numbers. it doesn't to my knowledge.

Q. I would like to turn your attention to the Roman numeral six section of the manual which is called "Intake New Module". Could you just take a look at those pages then I want to ask you a couple questions.

[98] THE COURT: What page is that?

MR. HIRT: This is Roman numeral six begins with page eight.

THE COURT: Thank you. I have it.

BY MR. HIRT:

Q. Okay. Mr. Stauffer, is this intake new module the eligibility process that you discussed on your direct examination?

A. No. The eligibility process—this intake new is just the first step in the eligibility determination process. It goes from intake new through—then there is the actual calculation of the grant and eligibility determination and then the verification. It's really three or four of these modules.

Q. Okay. Can you describe for us—because I didn't catch that—the steps?

A. Okay. The client comes into the office and applies for Aid to Family with Dependent Children. The first step they go through is what they call a pre-screening, and in that pre-screening they do what they call a file clearance. That's where the information that I described earlier this morning where they would do an intrajurisdictional match to determine whether they were on assistance, Aid to Family with Dependent Children, anywhere else in the Commonwealth. They would do it on whatever [99] information was available. If it was—if the client had brought a social security number for him or her and their children, they would do it on everyone that they had. In addition, as the further qualifiers, the name, date of birth, sex, county code, et cetera. That would be the first step. And they would, at that point in time, they would give them the verification kind of things, they would have to—they would have to go register for the work registration program. They would have to—they would give them an application to fill out, they would give them an SS-5, the social security application if there was anyone that wasn't listing a social security number, and they would basically set up an appointment. Possibly, if they were in a serious problem they may set up appointment for that following—that same day. Typically, I believe, though it could be several days later. They would have an application, they would bring in the application along with the filled out social security number application, if it was necessary, a work registration application, and whatever other documentation to prove whatever they needed to verify: bank statements, wage statements, if they had a vehicle how much it was worth, the title of the vehicle, documentation such as that.

Following that application process, then the information would be keyed into the system and they would do a—assuming everything was there, all the documentation was [100] there, they would do an eligibility determination to receive the grant and the follow-up verification.

Q. Okay. And in terms of this eligibility process, if the family household member has a social security number, are

they required to give it to the caseworker at that point in time?

A. Yes.

Q. I would like to turn your attention to Roman numeral six, the bottom of page nine and top of page ten and ask you to look at that.

MR. GILDIN: Excuse me, what page was that?

MR. HIRT: Pages nine and ten of Roman numeral six.

BY MR. HIRT:

Q. Do you have that in front of you?

A. Yes.

Q. Is this the items listed of information—are these the items that are requested at the eligibility stage?

A. The ones at the bottom of ten—bottom of nine, top of ten?

Q. Yeah. Maybe if you could read those into the record.

A. These are typical kinds of things that would be asked to do an intrajurisdictional verification. They would probably, I'm sure, differ from every state. (Reading) Last [101] name, first name—

THE COURT: Well counsel, this has already been read once.

MR. HIRT: Has this full list of items been read?

THE COURT: That's my understanding—well, down through the word "race", I don't think the words "social security number" was read.

MR. HIRT: All right.

BY MR. HIRT:

Q. Well, is the social security number one of these item?

A. Yes.

Q. Okay. Now, if you turn to page ten, and Mr. Gildin asked you about the matching—

A. Correct.

Q. —weights. When the term "weighted match value" is used in that column of numbers on page ten, what is the significance of a high number or low number for purposes of match?

A. Well, the high number is that the higher the number the more significant the match. For example, county is very significant. If we were in Lycoming County and we had a

match on the county, it would—as you can see, the high is 270 weight for that would be very very significant.

If it was in, say, Philadelphia County or [102] Allegheny, it's less likely because there is a chance that there could be two different people by the same name. So the county, that's just one example of the weight factor there, as you can see.

Q. Well, do you mean by county, the same county?

A. The same county. That has to be the same county, yes.

THE COURT: Well, I don't follow that. It seems to me that you have given the same weight to a match in Lycoming County, 270, as you are giving to one in Philadelphia County.

A. No, you're not, sir, I'm sorry.

THE COURT: All right. Well then, I didn't understand it.

A. If it's in Lycoming its 270, if its anyplace else it's nothing, as far as—

THE COURT: How can you tell that from this?

When you're saying "if it's Lycoming", you mean if there are two people—no, if it matches up in Lycoming you say it gets a weight of 270?

A. Yes, it gets the match, right.

THE COURT: All right, well, if it matches up in Philadelphia it gets 270 too, doesn't it?

A. No, sir.

THE COURT: You mean this is just good for [103] Lycoming County?

A. No, it's a weighted thing depending on where the match is taking place. It loses some of its significance as it moves further away from Lycoming County.

THE COURT: Well, I don't understand it. Go ahead.

MR. HIRT: I want to pursue that, maybe I can clarify it.

BY MR. HIRT:

Q. The high value associated with county that you have just described, now, we're talking about an intrajurisdictional match in this situation.

A. Correct.

Q. Now, what do you mean by "the same county", in terms of where the family happens to be or where they live; what do you mean by that?

A. Well, where they happen to be. I mean, you know, I guess the ultimate is that someone could be on assistance and trying to reapply, and if they are it's going to, you know, set off—it's going to be a very high degree that this person is the same person. If it's in Philadelphia—maybe I could use a better example—if it was in Philadelphia County, it also breaks down into district offices in Philadelphia. So, if it was in the same county and in the same district it may have a 270 mark. If it was [104] the same county and a different district it may be less likely that it's the same person.

Basically, the purpose of this is to determine duplicate people on the file. So if they're the same country, I guess the theory of this system is that they're more likely to be the same person than if they're on two different counties.

Q. So, in terms of the actual match of information, how—what sorts of data would be—

(Brief recess.)

Q. Mr. Stauffer, looking again at Roman numeral six, page ten, on the columns on the left it talks about first character of first name and gives an assigned weight to that of plus 88.

A. Correct.

Q. What does that first character of first name mean?

A. The first letter of the first name.

Q. Could you give us an example?

A. My name it would be R for Robert.

Q. Okay. And the next column, second character of first name has a match value of zero.

A. Correct.

Q. What would be an example of second character of first name?

A. R-O would be the first and second character.

[105] Q. Okay.

Who is responsible in the intake process for recording the information such as last name, first character of first name, second character of first name, remainder of first name?

A. That is an extract—that is part of a computer program that does the match of line. By "on line" I mean that information is keyed in and they would key in, you know, social security number, if they had it, name, but they wouldn't

key just the first character in, they would key in the whole name and then the computer would actually extract whatever was their particular formula.

I mean, this formula here is an example of a formula. This isn't a formula that—Pennsylvania may not necessarily use this formula.

Q. In terms of the input, though, who is actually doing the inputting into the computer?

A. The data entry clerk.

Q. Okay. And from where do they derive their information?

A. From an input document which is really transcribed from the application. The application is taken and the information is taken from an application and put on an input document.

Q. Okay. And who fills out the information on the [106] application.

A. The application? The application—well, Pennsylvania is right in a transition right now. Pennsylvania has something what they call a common application form that they are—which is going to be for Aid to Family with Dependent Children, medical assistance, food stamps and any other state-wide pension, any other state programs. And they're going to be implementing that. They have a couple of pilots now and they are going to be implementing it state-wide the beginning of July.

So, it's a combination of things going across the state. So—but basically, this information—so that actually, the recipient will fill out part of that, that's the reason I went into that example. With the current system, the system that's probably in the vast majority of the local offices now, it's the worker that will fill the application out and then send it to what they call a financial group that will fill out the input document, which will actually do the grant calculation.

Q. In terms of the matching value associated with these items, what does the term "weighted mismatch value" mean, which has negative numbers next to it?

A. That, if you have a mismatch you lose so many points.

Q. Okay.

[107] A. If it's missing one you don't lose them.

Q. In terms of the numerical progression that are on the weighted mismatch, is there any significance to social security number being a minus 110?

A. Well, if you had a different social security number, what that means to you have, you know, it's less likely it's the same person. If you have no social security number, those points are not taken away.

Q. What about on the other side, weighted match value in terms of plus 220 for the social security number?

A. If you have a social security number you gain 220 points so far as the weight of the match.

Q. Now, does this type of matching that you have just described apply at all to a situation where the country welfare department wants to match a household's earnings against, let's say, the Pennsylvania employment security system?

A. No.

Q. Does this type of match apply where the Pennsylvania public welfare official wants to match with one of the files of the Social Security Administration such as old age or survivor?

A. No.

Q. Let me turn your attention to Roman six, page twenty of Plaintiff's Exhibit 20.

[100] Mr. Stauffer, Mr. Gidin asked you several questions about the type errors which were typed, I believe, as Type #1, Type #2 and Type #3. Do you know why this manual that we're dealing with ranks them in that particular order?

A. It has a lot to do with calculating the eligibility determination and the grant, the grant being the amount of money that's going to be applied to that household.

Q. In terms of page twenty-one of Roman numeral six, the introductory sentence there says, (Reading) It should be understood that the edit/update module will provide the flexibility for program managers to increase or decrease the number and/or types of errors they wish to have identified. (End of read.) What does the manual means by "update module"?

A. Basically that's when you want to update, you have new information like when somebody comes in and changes their address and things like that.

Q. Is that update module something different from the initial eligibility process that you and I discussed in terms of listing the identifying data?

A. The intake new module is really talking about new applications and this eligibility does—that particular new application goes through this eligibility determination process, but they really go through an extra series of steps with intake new. Intake new being new applications.

Q. Maybe I'm misunderstanding you. Which process is [109] the one that goes through the additional steps?

A. A new application.

Q. And by "new application" you mean someone coming in for the first time for these benefits?

A. Yes.

Q. Turning your attention to paragraph six, page twenty-three, in the middle of the page of the text which Mr. Giblin read to you, I believe, beginning with "The third type of error..." and then it lists the effect and it says, to quote, but must be corrected for verification purposes. Again, keeping in mind that we're looking at what the manual says, what does that mean?

A. I'm sorry.

Q. Page Roman numeral six, page twenty-three, the sentence that begins with "The third type of error...". Can you see that?

A. Oh, okay.

Q. Okay. The phrase in there says, quote, but must be corrected for verification purposes, end quote. And again, we are speaking in terms of what the manual is saying. What does the term "but must be corrected for verification purposes" mean in terms of this process?

A. Before that information is verified and the person truely on the rules is eligible without any so-called caveat, that would make him up through verification.

[110] When I say verification, because of the fifteen-day limit, you cannot guarantee that you will have the results of these various types of matches back within the fifteen days

and, therefore, until the results of those kinds of matches are back, the person is really not called certified. In other words, after they're verified they're called certified.

Q. Now, in terms of the application process, what is the fifteen-day period that you are talking about?

A. Fifteen-day period to have to determine eligibility.

Q. And that would be the county welfare office?

A. Yes.

Q. And in the interim period what happens?

A. During that fifteen days?

Q. Yes.

A. They gather so much internal kinds of information to process the application and included in that is keying the information in and taking the application down.

Q. Okay. And by internal verification, are you speaking about what they call the intrajurisdictional match which is done within the county system?

A. That's really one of them. They also have—there is a separate system for work registration and a separate system if they have to be on monthly reporting; so [111] they actually have to do a grant computation.

So there is several steps within the county assistance office that they must go through before an application is ready for other third party verification.

THE COURT: Counsel, it is noon. I think we ought to take our break.

MR. HIRT: Okay.

THE COURT: I think we better take an hour and a half for lunch. Please come back at 1:30.

(Whereupon, 12:00, luncheon recess.)

[112] **INDEX TO WITNESSES**

For Defendant:	*Direct*	*Cross*	*Redirect*	*Recross*
Robert G. Stauffer	—	3	—	—
By Mr. Hirt	—	—	90	—

INDEX TO EXHIBITS

Plaintiff:		*Identified*	*Admitted*
P-39—	FAMIS manual	6	—

[116] [May 21, 1984]

(Court reconvened at 1:30 p.m.)

THE COURT: You pronounce it Stauffer; is that right?
THE WITNESS: Stauffer.
THE COURT: Stauffer. You may go ahead, counsel.
MR. HIRT: Thank you, Your Honor.

REDIRECT EXAMINATION (Continued)

BY MR. HIRT:

Q. Mr. Stauffer, at several points in your responses to Mr. Giblin's cross examination, you mentioned in your responses, "according to the manual."

As a clarification, what's been marked as Plaintiffs' Exhibit No. 20, the Family Assistance Management Information System, when was that document created?

A. I think it was written in 1979 and published in 1980.

Q. Was this prior to the statute that you spoke of, Public Law 98-216, concerning wage matching?

A. Not the wage match, but it was prior to the Public Law 96-265. That was the law I was referring to, which provides 90 percent federal financial participation.

Q. Is what's been marked as Plaintiffs' Exhibit 20 used by the states in Region Three of the Department of Health and Human Services, which you administer?

[117] A. Not really any more. It's really been—it's really out of date.

Q. Is there a document that actually reflects what the practice of states in Region Three is?

A. Well, when the law was passed in, I believe, September of 1980 and effective July of 1981, the law reflected several mandatory kinds of requirements that the system would have to do; and what we did was extract those mandatory requirements out of this general systems design and create a guide, which I referred to earlier as the Automated Application Processing and Information Retrieval System Guide. The reason that it's called that long name is that that's what's reflected in the law.

Q. Maybe for the purpose of this testimony, if I could refer to it as the "automated guide," would that be all right, because I can't possibly repeat all of those words.

A. I understand. When I'm talking about the FAMIS document and the automated application guide, et cetera, it's really the same system. It's the same law. It would be referred to as the automated guide.

Q. The automated guide, okay.

In terms of the requirements that the states must meet, such as the 90 percent requirement, is that incorporated into any other document?

A. Well, actually, for the states to pursue this 90 [118] percent federal match, they must submit to us an advanced planning document which outlines how they will meet the requirements of the law; also includes how much the system will cost and the time frame and the number of—and the amount of resources it will take; both data processing and hardware kinds of resources, which is machines, and also the kinds of programming and personnel that will be required to program the system and training, et cetera.

Q. Now, in terms of this document, are there mandatory requirements for the states to follow as opposed to discretionary ones?

A. Yes. Basically, the requirements that are mandatory are functional requirements. In other words, they have to meet the function; they don't necessarily have to do it in a specific way.

Q. Where does the Social Security number requirement fit into this document or this requirement?

A. It's part of—basically, this document or this automated guide is broken down into the same functional areas as the general systems design, which we talked about this morning; and it still pretty much lies in the intake piece of function.

Q. Coming back to Plaintiffs' Exhibit 20, which is the Family Assistance Management Information System, I wanted to ask you a few more questions about certain sections that you [119] spoke about.

First, if you could turn your attention back to Roman numeral six, page 10. Do you have it in front of you, Mr. Stauffer?

A. Yes.

Q. We had mentioned already, I think, that there's a series of points of information in the left-hand column, beginning with last name and ending with Social Security number.

In terms of each one of these items, who actually is responsible for putting each item of information into a computerized system?

A. The data entry operator.

Q. Okay.

A. Clerical person.

Q. In terms of that process, it is more likely that certain of these items of information will be recorded correctly or incorrectly?

A. It's certainly possible, especially with some names that may be misspelled, the first name, the last name first, things like that.

Q. In terms of the list of these pieces of data, is the Social Security number one of the items which is relied upon to be inputted correctly?

A. Yes, because you'll be able to do very tight edits on it. It's only nine positions, it's always numeric and there's [130] also ways to verify that, whether the number has been issued or not.

Q. Is it more reliable than last name?

A. Yes, because last name is—it's not a fixed number of positions, and it's—

Q. Is it more reliable than the remainder of first name?

A. Yes, because you could get into nicknames. You get into "Robert," "Robby," "Rob."

Q. Is it more reliable than second character of first name?

A. Yes.

Q. Can you give an example of that?

A. If you had "John" and "Jack," you'd match on the first character but you wouldn't match on the second.

Q. Is it more accurate than middle initial?

A. Yes. Many people, even though they formally have a middle initial, they may or may not use it.

Q. Is it more accurate than entries for birth month?

A. Yes. I think it's, again, one of the—subject to error. The birthday and year, the only kind of edits you can put on

that kind of information is whether it's one of 12 months or one of 31 days, those kinds of edits.

THE COURT: Well, what about the year?

THE WITNESS: You could put on that. You could put [121] those—I was just giving those as really examples, sir.

BY MR. HIRT:

Q. Are there input problems in terms of year of birth?

A. There can be. I mean, especially if you have some people—if you only allow two digits and you have people that were born in the 1800's still, that are close to their 90's or 100—we have some that are 100, that old—you have some problems with that.

Q. In each of these cases, are you relying upon an individual to input this data correctly?

A. Yes.

Q. Turning your attention, Mr. Stauffer, later in Plaintiffs' Exhibit 20, to Roman numeral six, page 23, I wanted to ask a few more clarifying questions about the categorization of the errors.

THE COURT: I must have misunderstood the page. What page is it?

MR. HIRT: Roman numeral six, page 23.

THE COURT: Page 23.

MR. HIRT: This is where errors are categorized by type one, two and three.

THE COURT: All right.

BY MR. HIRT:

Q. When this type of system is run that's described in this part of the document, where a check will be issued, is [122] it presumed at that point in time that the household is going to provide Social Security numbers once they get them?

A. Yes. At this point in time, when they get into these three types of error, they've gone through the intake process where they've either provided the Social Security number or have filled out an SS-5. Again, the Social Security number application is designated as the SS-5.

Q. What is the consequence if, despite the representation, the household doesn't provide the Social Security number?

A. If they don't provide the Social Security number or fill out the Social Security number application, they're not eligible.

Q. Is there any point to the system at which the failure of the household to receive the Social Security number for a particular individual will be detected by the county welfare department?

A. That's part of the—during the application process, right at the beginning. You know, if they don't either fill out the Social Security number application or have a number and verify that number, they won't even get into the system.

Q. Will someone in the welfare department be able to determine from the computer system that the family has been—if I can use the term—tardy in getting that number?

A. Yes. There's follow-up action, and that's one of the third-party verifications of federal verifications that was [123] mentioned earlier where they actually—any missing Social Security number is periodically—preferably monthly—sent to the Social Security Administration to do a follow-up action.

Q. I'd like to turn your attention now to Roman numeral six, page 48, where we deal with the topic again of Federal Verification Module, and again, we're going according to what this manual states.

The paragraph at the top of that page, 9-01, states: "The Federal Verification Module will select cases for Federal and State verification using criteria . . ." and a list of entries.

What does the term "Federal verification" mean in the context of this paragraph?

A. It's basically taking information from the state Aid to Family with Dependent Children file and doing any kinds of follow-up verifications that have to be made. It could be two things: One, for every application that's processed, there must be a match against certain files, which would be the Bureau of Employment Security in the Commonwealth of Pennsylvania; the beneficiary and earnings files, which is the Social Security file in Baltimore.

Also, the other function of this process is a follow-up kind of activity where if there is no—if redetermination is coming up, redetermination being a reapplication, routinely they do

some verifications to insure that there is no [124] new wages that have come up or that there is no new benefits on the Social Security file.

Again, they're two examples; they're not all of them. It also is used to do caseload management, and that's why the unverified Social Security number is in there. Anything that hasn't been verified through the federal verification system in the past would be reverified.

Q. When you talked about the unverified Social Security number situation, are you referring to a particular item in that listing of criteria?

A. Yes, the fourth item.

Q. The fourth item.

A. Yes.

Q. Okay. Does that fourth item of criteria have anything to do with the type of computer matching that you testified to on your direct testimony, where the Social Security number is the interface between the two systems?

A. No, it doesn't.

Q. Addressing your attention down to the bottom of that page, Roman numeral six, page 48, subparagraph 9-08, the term used is "reformatted to interface with file structures for the Beneficiary and Earnings Data Exchange."

Can you explain what that means according to the manual?

A. Reformat through interface is basically putting the [125] information that's on the state data file, the Commonwealth of Pennsylvania in this case, into a format with the data elements to be able to do that type of match.

Q. What is the purpose of that process?

A. Because to do a match with the Social Security number, the Social Security Administration, it may be looking for a particular data element such as Social Security number in, say, position one through nine, and if it's not in one through nine, it's ten through seventeen or ten through eighteen, they're not going to find it.

Q. Well, in terms of the purpose of this process, is it to cross-match for eligibility purposes, or is it to perform some other function?

A. This information—this is to get information—it could be for various reasons. As far as the BENDEX is concerned,

it's to determine—when they reformat these files, it's to be able to determine whether they're collecting benefits or earnings on the Social Security file.

Q. Let me address your attention to the following page, Roman numeral six, page 49, subparagraph 9-05. Do you have that?

A. Yes.

Q. It says in the middle of that paragraph: "Once exchange is established for the case, BENDEX can verify and/or provide notice of . . ." and then a series of items. One of [126] them is "and the beneficiary's own social security number."

What is the purpose of that use of the BENDEX system?

A. Basically, once the exchange is established, they may not be, in fact, receiving any kind of benefits at that particular time; but what it does is flag the Social Security file that if, in the meantime, benefits start showing up, Social Security benefits, they will know—that computer in Baltimore will know that there's been an inquiry made by the Department of Public Welfare in the Commonwealth of Pennsylvania.

What this does is that once the—the commonwealth only has to send their file once. That means that they don't have to send hundreds of thousands of records every month. You know, there's 200,000 cases in the Commonwealth of Pennsylvania. That's one of 50 states, and they have to do 50 of these a month. So, hopefully, they get it down into much smaller numbers that they can manage.

Q. Now, from what you've just said, you said 200,000 cases. What does that figure represent?

A. That's AFDC cases, approximately; AFDC being Aid to Families with Dependent Children. That's not counting food stamps nor the medical assistance cases, what they typically refer to as non-public-assistance food stamps and also referred to as non-public-assistance medical assistance.

THE COURT: I don't understand "non-public-[127] assistance food stamps."

THE WITNESS: Sir, that means that anyone—it's very possible that there's several clients that are receiving food stamps that aren't eligible for Aid to Families with Depend-

ent Children. That's what "non-public-assistance" means. They refer to public assistance as Aid to Families with Dependent Children.

It's just—there's many more cases for food stamps and medical assistance, say, in the Commonwealth of Pennsylvania than there are for Aid to Families with Dependent Children. I guess that everyone that's on Aid to Families with Dependent Children is also on medical assistance and food stamps, but the reverse is not true, if that helps clarify it.

THE COURT: Well what I was troubled about was the phrase, "non-public-assistance food stamps." If you get food stamps it sounds to me like you're getting public assistance. So, they're using the words in a very unusual sense, it seems to me.

THE WITNESS: Yes. It's probably a term that's been used for years and years.

BY MR. HIRT:

Q. Mr. Stauffer, you have referred to the automated guide as the source that was being used by the states. Was that one of the documents that you brought with you to the court on Friday?

[128] A. Yes.

Q. Is that one of the documents that you turned over to plaintiffs' counsel at the end of the day?

A. Yes.

MR. HIRT: I want to approach the witness to ask him to identify this, Your Honor, just so we have this.

MR. GILDIN: Your Honor, before he does that, it seems to be the appropriate time to object, if he intends to use this document, which we've not used, as an exhibit for the defense. The defense advised us that they had no exhibits for the purposes of this particular trial. They certainly knew that this gentleman had it.

The rule that we obtained and used it under concerns when the adverse witness uses a document to refresh the recollection.

THE COURT: Is this P-20

MR. GILDIN: No. He's starting on a whole new exhibit that no one has used.

THE COURT: All right. What is this document?

MR. HIRT: This document I was going to ask the witness to identify as being the automated guide that he referred to; but my purpose, Your Honor, is not to start a new line of inquiry on this point but merely to make the distinction clear in terms of what documents were used and relied on by the witness and where they are placed in terms of the testimony [129] because I think it's unclear as to what Mr. Giblin was asking about in terms of whether that's the source that's actually used as opposed to a manual which Mr. Stauffer happened to bring with him. I have no intention of getting into this document as such.

THE COURT: Well, it's not clear to me, and I think the best thing to do is to have the witness identify the document; and then, if it's going to be used for any purpose, I'll entertain the objection.

MR. HIRT: Okay.

BY MR. HIRT:

Q. I show you, Mr. Stauffer, a document which I just received from plaintiffs' counsel. Do you recognize that document?

THE COURT: Well, give it a number, will you, counsel?

MR. HIRT: Well, why don't we call it Defendants' Exhibit One for identification.

THE COURT: All right. What is it, please?

THE WITNESS: Sir, it's really more than one—it's about three or four—it's more of a workbook of my own. It's got three or four documents included in it.

THE COURT: All right. Well, I need about an eight-word or less description of it.

THE WITNESS: I would call it the automated guide.

[130] BY MR. HIRT:

Q. Mr. Stauffer, is Defendants' Exhibit One, which you just referred to as the automated guide, the same automated guide that we were discussing earlier with regard to your testimony?

A. Yes. It's contained in this booklet.

Q. In terms of actual program administration in Region Three, is Plaintiffs' Exhibit 20 a working document that is actually used by the states, or is Defendants' Exhibit One, the automated guide, the document that's actually used?

A. The automated guide is being used currently.

Q. Okay, thank you.

In Mr. Giblin's earlier cross examination, Mr. Stauffer, he asked you about various criteria for eligibility in the Aid to Families with Dependent Children Program, one of which he labeled as "need criteria."

Can you describe for us what criteria for eligibility in that program there are other than financial need?

A. Well, they must register for work with the work registration program. They must also, if they have any—there is certain criteria that they must register for monthly reporting, which means that they must report on a monthly basis the status of their case in certain areas. They must, again, apply for a Social Security number. They also must—for child support, there's assignment of child support. That's about four [131] examples.

Q. Are those criteria—by that, I mean the criteria other than need—applied uniformly, to your knowledge, throughout the United States?

A. Yes.

Q. Why is that, to your knowledge?

A. Just to keep the system standard and so it's applied equally across the country and fairly.

Q. Do you know why the system doesn't operate to allow individual caseworkers to make individualized determinations as to whether a particular household will or will not commit fraud?

A. Because they—well, for one thing, the caseworker could—is another type of person that could be committing fraud. So, I think to leave it in their hands, I think you're taking a risk there because one of the matches that take place is actually against state files, state civil service files to make sure that there's no one collecting welfare or Aid to Families with Dependent Children is also collecting—that may be a caseworker; and they've had some instances of that.

Q. Well, let's assume for the purpose of right now that we have an honest caseworker.

A. Okay.

Q. In that situation, why is there still uniform federal requirements, such as monthly reporting and Social Security numbers that an individual caseworker cannot exempt a [132] household from on an individual basis?

A. To insure that everything is done on a standard basis and a cost effective basis.

Q. In terms of the Pennsylvania program which you've outlined as 200,000 cases, do you know what sort of volume of computer transactions that represents?

A. That 200,000 cases, if I could—including Aid to Families with Dependent Children, food stamps and the medical assistance, is about half a million a day.

Q. Half a million a day of what; I'm not sure?

A. It's many things. It's inquiries, in other words, to determine if someone is receiving assistance. It could be data entry. It's really half a dozen—it's several different ways or several different reasons why the computer would have to be accessed.

There's a work registration system that has to be accessed; there's a monthly reporting system that has to be accessed.

Q. Coming back to the requirement of furnishing Social Security numbers, can that system, in terms of the volume of transactions, be run effectively without the Social Security number?

A. I wouldn't say that it cannot be. It my opinion, it can't be run effectively. It's a situation where the further you get away from the standard, and the standard really being [133] the Social Security number, the less likely you are—one of the standards being the Social Security number—the less likely you are of having a good match.

MR. HIRT: Your Honor, at this point, I have no further questions. I will say that I could take the alternative of moving to strike Mr. Giblin's cross examination concerning Plaintiffs' Exhibit No. 20 since the witness has testified that that's not a document actually used, but I think that one could say that that goes to the weight of the evidence.

So, I'm not going to technically ask you to strike the entire cross examination because it will speak for itself, but I think

that in terms of the weight to be attributed to the document, the witness has testified to its probative value.

THE COURT: Are you through with the witness?

MR. HIRT: Yes.

THE COURT: Do you have recross?

MR. GILDIN: Yes, Your Honor.

THE COURT: Now, this must be limited to new matter brought up, if any, by Mr. Hirt on his redirect.

MR. GILDIN: I understand that, Your Honor.

RECROSS EXAMINATION

BY MR. GILDIN:

Q. Mr. Stauffer, Title IV-A of the Social Security Act, that's Aid to Families with Dependent Children.

[134] A. Yes.

Q. Prior to the amendment of that act, it's my understanding that the federal government was going to provide 50 percent of the matching funds.

A. The federal government provides 50 percent of all administrative costs.

Q. Then, there was one amendment that took that up to 90 percent; is that correct?

A. That's correct, for data processing.

Q. Do you still have Plaintiffs' Exhibit 20 in front of you?

A. Yes, sir.

Q. This is the document that you said was outdated because it was before the amendment; correct?

A. Yes.

Q. Take a look at Roman numeral two, page one, discussing background. I don't have a convenient way other than to count the lines down.

THE COURT: Well, if you can give me a percent.

MR. GILDIN: It's about right in the middle, Your Honor.

THE COURT: All right. "This is in contrast"? What do you want to ask?

MR. GILDIN: The line just before that.

THE COURT: All right.

[135] BY MR. GILDIN:

Q. It begins: "States may currently receive Federal matching for the systems as an administrative cost, but Feb-

eral matching is limited to 50 percent. This is in contrast to the Medicaid program, in which 90 percent Federal matching is authorized ..." Correct?

A. Yes. That's the old one that you're referring to.

Q. Now, right at the bottom of that page, sir, the last two sentences from the bottom. It states: "Title IV-A," which you just said was the Aid to Families with Dependent Children Program; correct?

A. Yes.

Q. "... of the Social Security Act has consequently been amended to provide for increased Federal matching funds for State computer systems. This ..." that is, the amendment, "... has fostered the need for the development and delivery of a Management Information System for AFDC to aid the States in meeting their responsibilities."

Going to the next page: "To meet this goal and with the cooperation and interest of the States the Office of Family Assistance, Office of Procedures, Division of Systems Development, has developed a Family Assistance Management Information System for the Title IV-A program." Isn't that correct.

A. Yeah. Again, that was part of the bill at the [136] time. It wasn't passed. It wasn't passed until September of 1980.

Q. It says here on Page II-1: "Title IV-A ... has consequently been amended."

MR. HIRT: Your Honor, the document speaks for itself.

MR. GILDIN: Exactly. That's what I'm trying to have him read.

THE COURT: We're not getting anywhere with this counter-argument. Is there an objection?

MR. HIRT: Yes, Your Honor. The document speaks for itself, and I'm not too sure whether he's trying to impeach him with the document or what the facts are.

THE COURT: What's your view, counsel?

MR. GILDIN: The objection that the document speaks for itself is precisely the purpose of pointing that out because the document itself says—and he admitted that Title IV was amended one time—that this document is a product of the fact of the amendment of that statute, and it says right in

that document, Your Honor, that Title IV has been amended and that's why they generated this document.

THE COURT: All right. I'll overrule the objection. Now, I had trouble finding where you started on that. Did you start in the line beginning with the word "techniques"?

MR. GILDIN: Yes, Your Honor.

[137] THE COURT: Okay, I've got it.

BY MR. GILDIN:

Q. "Title IV-A . . . has consequently been amended to provide for increased Federal matching funds for State computer systems. This has fostered a need for the development and delivery of a Management Information System for AFDC to aid the States in meeting their responsibilities," and this, sir, is your response.

A. All I can say is that the law was not passed until after this was published.

Q. Contrary to what it says right in the document?

A. Contrary. I mean, I think they—what I believe, sir, they're referring to is a projection here. The house bill was amended, and I don't know where it says anything about being passed, but I'm not a legal expert.

MR. GILDIN: May I have a moment, Your Honor?

THE COURT: Yes, sir. Does this document have a date anywhere?

THE WITNESS: Sir, the original ones does. It was January 11, 1980.

BY MR. GILDIN:

Q. Even though you testified that each state is entitled to modify this system, the system described in this Plaintiffs' Exhibit 20, this FAMIS system—

A. Yes, Sir.

[138] Q. —still is a standard for evaluating the state systems for which funding is requested; isn't it?

A. No, it's not.

MR. GILDIN: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

BY MR. GILDIN:

Q. Now, you've identified this red book, haven't you, as the book that you say is the one that you use in Region Three?

A. Yes.

THE COURT: What document is that; is that D-1?

MR. GILDIN: It's Defense Exhibit One.

THE COURT: D-1, all right.

BY MR. GILDIN:

Q. Would you please read along with me, sir, and this is under systems requirements, is that correct, in your red book?

A. Right.

Q. "OFA will use FAMIS as its standard for evaluation of systems for which funding is requested under Section 406," is states there; doesn't it?

A. That's correct. FAMIS is much more. You know, it's not just that particular general systems design.

Q. Well, that statement appears in this—

[139] MR. GILDIN: What was the language that you were referring to is as, Mr. Hirt; the automated guide?

MR. HIRT: The automated guide.

BY MR. GILDIN:

Q. That statement appears in what you've termed as the automated guide; doesn't it?

A. Yes.

Q. Now, in response to many of my questions, sir, you stated: Well, that's what the FAMIS guide said, but that's not perhaps how they do it in Pennsylvania.

But when Pennsylvania does its intrajurisdictional search, they don't require a Social Security number; do they?

A. Intra- or inter-?

Q. Intra-.

A. It's one of the factors, but they'll still do it without it.

MR. GILDIN: Your Honor, at this point, we have no further questions for the witness.

THE COURT: All right.

MR. HIRT: Your Honor, I have some redirect based upon that last—

THE COURT: Now, wait a minute, counsel. You've already had redirect. We have direct, cross, redirect, and recross. I've never I card of anything further. What do you call it?

(140) MR. HIRT: I don't know whether it's re-redirect or not, but I think I can ask the witness questions based upon the last round of questions and limit myself to that.

THE COURT: Well, I don't understand why because if they did not relate to something new that you brought up, then you should have objected. If they related to something new that you brought up, then they're perfectly re-sustable.

I cannot give three rounds per counsel per witness. I've never done it in any other case—I've only been asked about three times—and I cannot do it.

So, you may step down, sir.

MR. GILDIN: Your Honor, at this point, we would move for the introduction of Plaintiffs' Exhibit 20 now that the witness is finished.

THE COURT: All right. Any objection:

MR. HIRT: Yes, Your Honor, I do have an objection which is that this is not a complete version of the FAMIS manual, which is my first objection, because plaintiffs have not put in one of the modules that deals with the Social Security number requirement in full. They've omitted some pages, and I think that the document is out of context if they want to admit it that way.

The second objection I would have, Your Honor, is that the witness has testified that it's not a document actually used by the Commonwealth of Pennsylvania; therefore, I don't [141] think it has any probative force. So, I have two separable objections.

MR. GILDIN: Your Honor, maybe if I could clarify the motion: Under Rule 612 of the Federal Rules of Evidence, which is how this document came up in the first instance, it states that the adverse party is entitled to introduce into evidence those portions which relate to the testimony of the witness.

Therefore, Your Honor, we would only move for the admission of the document insofar as those portions were used as part of that cross examination, which seems appropriate under Rule 612. With respect to the efforts to discredit the document itself, I think we've amply demonstrated that it is relevant and timely within the parameters of the document itself.

THE COURT: We'll overrule the objection and admit it.

MR. HIRT: Your Honor, can I ask that remaining portions be introduced to the sections that were omitted in part because they go from Page III-1 to Page III-7.

THE COURT: Not at this point; nobody has read it. If you want to put somebody on to read those, that may be a proper thing to do; but I can't admit anything that has not been read, and it has not been read.

MR. HIRT: Your Honor, most of these pages have not been read into the record; only a few sections of these [142] pages have been read into the record. If that's how narrowly Rule 612 is being construed—

THE COURT: And that's all I'm going to consider just what's been read into the record.

MR. HIRT: Thank you, Your Honor.

THE COURT: Now, do you have another witness, Mr. Hirt?

MR. HIRT: Yes, Your Honor, Virgil Conrad.

VIRGIL L. CONRAD,

called as a witness on behalf of the defendants, having first been duly sworn according to law, testified as follows:

EXAMINATION

BY THE COURT:

Q. Your last name?

A. Conrad.

Q. C-o-n-r-a-d?

A. Yes, sir.

Q. What was the first name?

A. Virgil.

Q. I thought at first it was said to be "Joseph," and I wondered whether your middle name was Korzeniowski.

Do you use a middle initial?

A. "L."

[143] Q. "L." Where do you live, please?

A. I live at 9909 Lake Braddock Drive, Burke, Virginia.

Q. Burke, B-u-r-k-e?

A. Yes, sir.

Q. Where is that, please?

A. That's about 15 miles from Washington, D.C., in northern Virginia.

THE COURT: I see, all right. You may go ahead, counsel?

MR. HIRT: I wanted to approach the witness so I could get some more water, Your Honor. I'm running out.

THE COURT: Go ahead.

DIRECT EXAMINATION

BY MR. HIRT:

Q. Mr. Conrad, by whom are you employed?

A. United States Department of Agriculture.

Q. What is your title?

A. Deputy administrator for family nutrition programs.

Q. When did you assume that position?

A. August of 1992.

Q. Briefly, where is that position within the hierarchy of the United States Department of Agriculture?

A. Within the Department of Agriculture, we have a [144] major section called the Family Nutrition Services. The food stamp program, which I oversee, is one of the major programs within the unit that reports to an assistant secretary with that title, who in turn reports to the secretary.

Q. Briefly, Mr. Conrad, what is your educational background?

A. I have a bachelor of arts degree and I have a master's in public administration.

Q. Prior to becoming deputy administrator, what was your employment?

A. I started work in 1961 as an eligibility worker in the West Virginia Department of Welfare system, worked for that organization 16 and a half years in the capacities of an eligibility worker, county director, district administrator, assistant commissioner for programs, operations and programs planning and concluded my career there in 1978 in the deputy commissioner.

Then, I was employed as the commissioner of the South Carolina Department of Social Service and continued my employment there until I joined the Department of Agriculture.

Q. While you were deputy commissioner in West Virginia, can you briefly describe what your responsibilities there were?

A. As the number two person in the organization in the chain of command reporting to the commissioner, it was my job to oversee the program policies of the agency, which included policies for our social service programs, those dealing with [146] foster care, adoption and protective services of children.

My responsibilities included the policy oversight of the Medicade Program, Title XIX, and our income programs, as we called them: Aid to Families with Dependent Children and the food stamp program. In addition, I was responsible for the local office administration.

Q. What were your responsibilities as commissioner in the State of South Carolina?

A. As the commissioner in South Carolina, I was the chief executive officer for the department that managed the social service programs that would parallel those in West Virginia, the food stamp program, the Aid to Families with Dependent Children and the medical program. As the executive officer, it meant I was responsible for the day-to-day management of the agency.

I reported to a board that was duly elected by the general assembly to set the policy for the agency.

Q. In terms of your responsibilities in West Virginia and South Carolina, did you become familiar with the eligibility process for obtaining benefits in the Aid to Families with Dependent Children program and food stamp programs?

A. Yes, sir.

Q. Did that include the use of Social Security numbers in that eligibility process?

A. Yes, sir.

[147] Q. Briefly, Mr. Conrad, can you describe your present duties in the Department of Agriculture?

A. My primary responsibility is for the issuance of policies and regulations in conformance with the laws and/or the administrative discretion as provided to set the eligibility and to oversee the cost efficiency of administering the food stamp program.

Q. Can you give us an estimate as to the number of households who participate in the food stamp program on a monthly basis?

A. I believe currently it's about 7.2 million households.

Q. Is that on a monthly, yearly . . . ?

A. A monthly basis.

Q. All right.

A. It would be approximately 21 million people in any one month, and throughout the year, because people are entering and exiting the system, probably about 26 million Americans or one out of every six receive food stamps on an annual basis.

Q. All right, fine. Can you give us an estimate as to the annual cost of the program?

A. This fiscal year, it will cost approximately $11-billion. About $10.2-billion are the federal costs for the food stamps themselves to reimburse the recipients, about $709-million is to reimburse the states for their administrative costs and [145] about $96-million are required for the federal government to print, distribute, regulate and oversee the program.

THE COURT: I don't understand what you mean by "reimburse the recipients for the food stamps."

THE WITNESS: Your Honor, I probably should more correctly say to reimburse the grocers, the retail stores, to which they take their stamps to buy their food.

THE COURT: Now, I was concerned about that and trying to figure it out, and I missed the last thing that you said about the administrative costs. So, just go back and read the tag end of that last answer; would you, please?

(The previous answer was read back in part by the reporter.)

BY MR. HIRT:

Q. In terms of the population that receives food stamps, is there an interrelationship with the group that would receive Aid to Families with Dependent Children benefits?

A. Approximately 55 percent of all of the food stamp recipients concurrently receive Aid to Families with Dependent Children. We refer to those as public assistance households; and the balance that receive the food stamp program, we refer to as non-public-assistance households, meaning

those individuals are engaged in work; they are working, which makes them ineligible to draw Aid to Families with Dependent Children but does make them financially eligible to receive a supplement of the [149] food stamp program. So, about 55 percent, I think, is your answer.

Q. Does the food stamp program differ from the Aid to Families with Dependent Children program in terms of the relationship of the state and federal governments?

A. It's different in several ways. First and most significant is that the food stamp program has national eligibility and national benefit, unlike the Aid to Families with Dependent Children. What I mean is that, in the 50 states and territories, the eligibility is uniform and the benefits are uniform. In Aid to Families with Dependent Children, the eligibility would be more alike but the benefits would vary from state to state, depending on how much they pay the families.

Secondly, the food stamp program in the area of eligibility is national and uniform. I'll give an example to show the difference between it and the Aid to Families with Dependent Children. A resource or asset test in the food stamp program where there's a non-elderly person in the household is $1500.00.

THE COURT: A non what?

THE WITNESS: Non-elderly. It's $1500.00, and that would be uniform throughout the nation. The food stamp program has, in the national law, a requirement that a person can have no more than $1,000.00. So, the state can't set the amount at any place below the $1,000.00 threshold, and many [150] states do; but in our program, it's $1500.00 universally across the system.

So, therefore, in summary in answering your question, the two things that's most different is that you have national eligibility and national benefits.

Q. What about the respective roles of the federal and state governments in financing that food stamp system; is that a different arrangement than governs the Aid to Families with Dependent Children Program benefits system?

A. Yes. The $10.2-billion that I referenced was the federal costs for the food stamps to reimburse the retailers

throughout the nation for eligible recipients is a hundred percent paid for by the federal government.

Q. Are you familiar with the requirement that applicants for food stamps provide the Social Security number for each family member?

A. Yes, sir, I am.

Q. What is the rationale for that requirement?

A. To put that in proper context, you must, I think, look at the legislative history wherein it was passed and that was—first, let me say it was one of several initiatives that congress has authorized to address duplication in the program, to minimize fraud and abuse in the program; and it was out of that context that the law was passed to authorize the establishment of the Social Security number as well as for efficient [151] administration so that we can have and begin to move toward standard eligibility files in the states so that various verifications could be completed.

Q. What do you mean by standard eligibility files?

A. I'm trying to describe a system that would have at least common information in all systems that we could access. For example, we're not only concerned about checking among the various *state* jurisdictions as well as various federal accounts, but we're interested in being able to access private enterprise, namely, the banking community; and one of the standard things that banks use as an identifier is Social Security number. Banks are not accustomed to keeping secondary information on file; so, therefore, congress—when they authorized us to move in this direction—moved us toward a common—were trying to move us toward a common numbering system that private as well as government uses to enable us to have an efficient access for verification.

Q. Mr. Conrad, I think you've used the term "secondary data." Is that the term you used, or "secondary information" in terms of the banks?

A. I used that in terms of saying a source, meaning a nongovernmental source, not a secondary; a nongovernmental source.

Q. Okay, I see. fine.

Do you have any estimate as to how much overpayment [152] of benefits there's been in the food stamp program?

A. In fiscal year 1983, it's approximately 8.5 percent overpayment in the food stamp program, which translates into about $950- to $900-million.

Q. Do you have any estimate as to how much of that can be attributed to intentional fraud as opposed to other sorts of errors?

A. It's very difficult for us to gauge that, but based on some limited studies that we have and based on my experience, I believe that intentional fraud, as defined by a criminal situation, is one to three percent.

MR. GILDIN: Your Honor, I'd object and move to strike for want of foundation. He said that it's difficult to calculate. I don't think that the foundation for that number is, in fact, reliable.

THE COURT: What's your view?

MR. HIRT: Well, Your Honor, I think that the witness has the right to clarify the extent to which he's confident as to the number, but I think Mr. Conrad has said what he believes the answer to be; and I don't think he's up here as a mathematician. I think that can go to the weight of the evidence; but I think Mr. Conrad has said what he believes the estimate to be in terms of fraud versus other types of errors, and I think his answer should stand as is.

THE COURT: All right. We'll overrule the [153] objection.

BY MR. HIRT:

Q. Can you describe for us, Mr. Conrad, how Social Security numbers are used in the food stamp program.

A. It's used in a variety of ways. First, it's used to access the Social Security information. It's used to verify income. The states are required to complete wage matching with either the unemployment or the Social Security Administration, and the use of the Social Security number is essential to complete that task. The states are required to do intra- as well as—intrastate matching to assure that duplicate payments are not made within the same state; it is used in that system.

It's used as part of a national data system on disqualified recipients. By that, I mean: We have a rule that if people attempt to get benefits under false pretenses, the first offense

is six months off the program; the second offense is twelve months of the program; and the third offense is permanent disqualification. The Social Security number is a part of that, and it's the only national data file that we keep on food stamp recipients—all other files are kept within the state—but we keep a national record of those disqualified individuals; and it's used in that instance.

Q. In terms of the distinction between national files and state files, is this centralized file that you've mentioned on permanent disqualification the only file maintained by the [154] United States Department of Agriculture on food stamp recipients?

A. It's the only one that we keep other than one other file that's supplied by the state, and that's a—the states are required to keep track of our quality control cases, which are those cases drawn by statistical sample to verify the eligibility of the household for receipt of benefits; and as the states conduct their secondary check, a second review of those cases, that information is placed on file at the national level, and we use it to determine the error rate, this 8.5 that I made reference to. So, we keep a limited statistical file of those cases that are selected for the eligibility verification process. Those are the only two files that we keep nationally.

Q. Coming back to the national file on people who might be disqualified, what specifically is in those files?

A. We keep name, we keep Social Security number, and we keep the birthdate on file. I'm not aware if the address at the time is on file or not.

Q. What is the purpose for maintaining this set of records?

A. The purpose is to complete our responsibility under the law wherein we're responsible to make available to any state upon inquiry individuals who have previously been disqualified and for the length of the period of disqualification to assure that they're not moving from one jurisdiction to another to avoid [155] the penalty under the regulation.

Q. From one jurisdiction to another, what do you mean by that term?

A. One county to another within a state or from one state to another.

Q. Does any particular agency obtain access to this central file that you've referred to?

A. The states are able to make access to it only.

THE COURT: As distinguished from whom?

THE WITNESS: Well, it might be distinguished from a sister agency, meaning the state welfare agency, the Aid to Families with Dependent Children, for instance, managers would not be able to make access to it, nor would other federal agencies independent of ours; for example, the Internal Revenue or agencies like that is what I meant.'

BY MR. HIRT:

Q. Coming back to the state level, how are Social Security numbers used in the food stamp program?

A. First, I think I would like to indicate that they are used as a part of the—all automated computer systems in terms of identification with secondary information, such as the name of the individual and the birthdate; and it is a unique identifier for efficiency as you try to move out to complete your verifications of eligibility.

Q. In terms of efforts at verification, can you [156] describe some of those for us?

A. States are required to complete wage matches. The states are required to refer certain classes of individuals for work registration, job search. They're used for verification and communications to school systems for ages of children, not only for our program but for sister federal agency programs such as the school lunch program.

They're used in an efficiency way as the common identifier to unlock many other files that we have to move to to obtain verification. For example, within the asset requirements, we have rules associated with how many vehicles you can own. So, therefore, it would be a very efficient way to cross-check with motor vehicles.

We have rules associated with unearned income and earned income, meaning those that you work for wages and those that are pensions or interest generated accounts. So, they're used to complete those types of verification to assure

that the proper—that the individual is representing his circumstance properly to the state agency.

Q. You've used the term, Mr. Conrad, that the states are required to perform wage matching and work registration. From where is that requirement derived?

A. From the federal—from the law passed by congress and regulations issued to the department. The wage match was a requirement beginning in January of 1988, and the work [157] registration has been a requirement of the program for about three years, three or four.

Q. You've made the distinction, Mr. Conrad, between the Social Security number and secondary information. Why do you draw the distinction between Social Security number and secondary information, such as name and date of birth.

A. The objective in moving into any type of verification, computer assisted, is to be as proficient and let the computer do as much work as possible. Birthdate and name can more easily be alike by coincidence or by intentional fraud.

Therefore, I consider those—and the term that I use—as secondary criteria. The Social Security number is unique to the individual and, therefore, is one of our primary screens that we use. When we do matches, what we want to do is to reach the highest potential output of that process before we move the eligibility worker into actually taking the final action on the case.

So, therefore, if we can reduce the amount of time and reduce those duplications by using the Social Security number, we have a much more efficient system.

Q. Does the requirement that individuals in a household furnish their Social Security numbers have any impact on their possible desire to commit fraud on the program?

A. I think—the answer is yes, the reason being that individuals must supply the names and birthdates of all members [158] of their household when they're applying for benefit. If they are required to provide birth certificates, if they're required to obtain Social Security numbers, these become a series of events that preclude individuals from the ability to walk into the office, manufacture a household, make up names, make up numbers and receive benefits to which they're not entitled.

This is a concern that's based in fact and based on history in operating the program, that individuals have sought these kinds of schemes out, have put them in place and have received benefits to which they're not entitled. Therefore, congress, in observing this process and interacting with the various administrations running the food stamp program, gave us the authority and placed a requirement on us that we obtain Social Security numbers as another measure to validate the information that's given to us.

THE COURT: You say congress did that?

THE WITNESS: Yes, sir.

THE COURT: Does it provide in the law that the person must supply you with a Social Security number?

THE WITNESS: Yes, sir.

THE COURT: What law is it; do you know? What's the citation.

THE WITNESS: Your Honor, I may have it with me. I don't know it from memory, but I can provide it. I have it with me, as well as the congressional history on the law; and [130] I'll be glad to make it available or review it and testify from the stand, if you prefer.

THE COURT: Well, it may be in your brief.

MR. HIRT: It's in our briefs.

THE COURT: All right. I'll look for it.

BY MR. HIRT:

Q. You've mentioned the provision that members of the household provide their Social Security numbers. Why are children required to provide the Social Security numbers in this program.

A. The requirement serves several purposes. The first is a verification, an additional verification of the actual existence of the child, beyond just a birth certificate. It's another step in the process that would cause people to pause and think if they were making up fictitious children to draw benefits on. So, that's one reason.

Secondly, it's to avoid intentional or unintentional duplicate payments, so that we have a capacity to check that; and third, it's needed for identification of potential sources of unearned income, which must be reported; and it gives us the

capacity to verify if, in fact, children do have concerned income.

Q. Does the finding of eligibility for food stamps have any impact upon eligibility for any of the other nutrition programs administered by the Department of Agriculture?

[160] A. We have in our school lunch program a three percent verification requirement, meaning that the school officials are required to select a statistical sample of three percent of their lunch students to verify the information provided. Contained in that requirement and in that regulation is an acceptable standard of verification that they're receiving Aid to Families with Dependent Children, if they're receiving food stamps, particularly the latter. The food stamp program, it serves as an automatic verification that they're eligible to receive the school lunch.

Q. What about the eligibility phase of the program? Let me clarify that.

If a family has been found eligible for food stamps—

THE COURT: Eligible or ineligible?

MR. HIRT: Eligible. I'm sorry, Your Honor.

BY MR. HIRT:

Q. —does that qualify a family for any participation in other programs administered by the department as an eligible criterion?

A. No, sir.

Q. Can you briefly describe—

A. Let me clarify, if I may, on reflection. It would be possible, in addition to the school lunch example that I made reference to, that many states may use—and it's [161] permissible, although it's not required—it's permissible that they can use the food stamp eligibility to automatically qualify our senior citizens for what we refer to as the surplus commodity program, commonly known as the "cheese giveaway."

THE COURT: Now, I'm not clear on this. Are you saying that in order to participate in the so-called "cheese giveaway," an elderly citizen also has to be qualified, say, for food stamps?

THE WITNESS: Your Honor, I appreciate the clarification so I can be more precise with my answer. What I am

saying is that eligibility for the food stamps is not a prerequisite for the commodity program; but if they are eligible for the food stamp program, it precludes other forms of verification. That program accepts that certification of the individual's income status to be eligible to get the surplus commodities.

THE COURT: Well, what I'm not clear on is: Can person over, let's say, age 75 participate in this "cheese giveaway," or is there some sort of an asset or income ceiling?

THE WITNESS: There is an income screen and ceiling, and it is not a prerequisite that you receive food stamps. You could be eligible for that program without receiving food stamps and you might have to have some other type of verification of your income at the state level.

THE COURT: I understand, but I still don't quite [162] understand: A person 75 with an $80,000.00 income per year, is he ineligible—

THE WITNESS: Yes, sir.

THE COURT: I'll put it another way. Is he eligible for participation in the so-called "cheese giveaway"?

THE WITNESS: That individual that you've described would not be. It's means tested, and the means testing of the program, of the eligibility for it, is set so that any food stamp recipient would be automatically eligible for that means test.

THE COURT: Well, suppose the individual is 75, has no substantial income but does have substantial assets. Let's say he's got a tract of land worth $500,000.00 with timber on it, and he doesn't get any income from it, and that's all he's got. Would he be eligible for the so-called "cheese giveaway"?

THE WITNESS: Probably he would not. I am not an expert; this is not in our program area. The answer is: probably not. The states do have the right—and it does vary from state to state—but that type of individual would not meet the intent of the thrust of that program, meaning that it's to go to our lower income citizenry.

THE COURT: I'm sorry to digress like that—

MR. HIRT: That's all right.

THE COURT: —but there's a great controversy in this area about certain wealthy individuals who are over 70 [165] showing up and then they've accepting butter and cheese. I was curious as to what the law was.

BY MR. HIRT:

Q. Mr. Conrad, can you describe briefly for us the work registration provision of the food stamp program that I think you referred to earlier?

A. The work registration provision of the program, its policy aim and objective is to required an individual to register with the employment security office and through that process, hopefully, link him to job opportunities to enable him to become employed and self-sufficient so that the taxpayers aren't required to make services available to him.

In our program, it's probably easier for me to describe who's not in it and to say that all others would be in it. Individuals that are below the age of 16, individuals that are above 59 are not required to register; parents of children, a parent, particularly one parent with children under the age of 12 would not be required; any parent who has a disabled member that they have to provide custodial care would not be required to register; any individual drawing unemployment compensation would not be required to registered because that program has a requirement for registering for work in it; and individual working 30 hours or more per week would not be required to register on the theory that they're working more than 30 percent of the time; and the last, any student that [166] would be eligible for the food stamp program who are enrolled more than 30 percent in college or in a technical training program would not be required. All other individuals are required to register and to cooperate with the state in looking for jobs and accept employment when it's made available to them.

If they do not accept a bona fide offer of employment, then, of course, there's penalties associated with that to modify their behavior.

Q. You've discussed also the wage match provisions of the program. How is the wage match accomplished in the food stamp program?

A. Wage match provision is very important from the standpoint of addressing one of our major problems, and that is unreported income. The process is that the states are permitted, for compatibility with the Aid to Families with Dependent Children Program, to take the lead of that program in the frequencies of matches. They can do them quarterly, they can do them upon application, and they can follow whatever method that they're using in that program to cut down the administrative expenses, if they so choose.

The primary source of the match is the unemployment compensation files, traditionally administered by the employment security offices in the various states and territories. Secondarily, if that information is not available in the state—and we only have about 12 states where they do not report their [165] wages quarterly—then they can match with the Social Security Administration; or based on a change in the law in December of 1993, the states are permitted to match against any file that comparable to their unemployment compensation file, meaning that if they have access to their state income tax and if that state income tax is posted quarterly, that would be a standard—that would meet the standard and would be accepted as a substitute.

Q. Does the requirement that household members furnish Social Security numbers have any role in these wage matches?

A. Yes. It's a primary factor from the standpoint that without the Social Security number, many of these files do not readily keep on board or keep in their files, the data files, the birthdates; and its the common logic within the computer wherein the unemployment compensation are also kept with the Social Security number. It enables the state to have greater proficiency when they're completing their matches.

Q. Why are Social Security numbers used as an identifier instead of names of individuals?

MR. GILDIN: I'm going to object, Your Honor. I'm not sure that the witness testified that they're used instead of names as identifier.

MR. HIRT: I'm sorry, Your Honor. I'll correct that.

[166] BY MR. HIRT:

Q. Mr. Conrad, in performing these wage matches, you've stated that the Social Security number is primary. How does the Social Security number relate to the use of a name as a source in wage matching?

A. In addition to the Social Security number—because that system in and of itself is subject to human error, transposing and situations as that, going into the system and getting it verified in the interim—most states match with the Social Security number and the name to identify—for identification purposes because within their state welfare system, they have three primary ways of identifying households: They have their own case number, they have the Social Security number and they have the name of the individual; and then, there's more criteria like birthdates and things of that nature, location, sex and all of those kinds of things.

So, the companion of the—in combination, using the name and the Social Security number, one increases the integrity of the match and reduces unnecessary burdens of people having the same name or very similar names appearing to be matched when, in fact, it is a different individual.

Q. You've also testified as to the Department of Agriculture's concern with error rates. Does the Department of Agriculture have any programs in place for states to reduce their error rates in food stamp determinations?

[167] A. Again, congress provides the guidelines and the standards in that. Under our current law, we have a progressive—let me rephrase that. Under our current law, we have a decreasing error rate standard, meaning that for fiscal year '93, the states are required to maintain a nine percent or less error rate or be subject to repayment of a portion of their administrative funds to the federal government.

In fiscal year '94, they must move to a seven percent standard; and for fiscal year '95, they must move to a five percent standard. The Department of Agriculture is very much concerned about the error rate in the food stamp program for several reasons. One, we're concerned about the integrity and the public confidence in the state and federal

governments' capacity to manage the programs as represented by an error rate.

Secondly, we're concerned because we, meaning the federal taxpayers dollars pays the full amount of the food stamp costs; and thirdly, we're concerned for the integrity of the system from the standpoint of fraud and fraudulent intent; and we have devised with congress concurrently many rules and regulations to address the problem of the nine percent error.

I'll give you some examples of those, I think, which was the heart of your question.

Q. Can you give me some examples?

A. I'll give you some of those. The wage match requirement was to address and recognize that the primary cause [168] of overpayment is the improper or lack of income reporting. The household's failure to report the changes in their circumstances timely to us.

THE COURT: Excuse me, I don't understand that. "Lack of income reporting," what do you mean by that?

THE WITNESS: Meaning, Your Honor, that when someone comes into the local office and the caseworker says to them, "Are you employed?" They say, "No," and in reality, they are and are drawing wages and are not reporting it, meaning, Your Honor—

THE COURT: It's not a lack of income; it's a lack of reporting of income; is that right?

THE WITNESS: Yes, sir, or they obtain employment and they fail to report that to us, increased employment, failure to report changes in their household circumstances, people moving in and out of the household.

We try to address that now with a requirement in the law that the states must send out a monthly form to the households to be mailed back. We call that monthly reporting. We provided some additional incentives to the states to be more vigorous in their pursuit of fraud investigations, in prosecutions and claims, collection of payments that are received intentionally or unintentionally to which people are not entitled. That program authorizes us to pay 75 percent of the administrative costs when we normally pay 50 percent. We also [169] permit the states to keep 50 percent of all of the

food stamp dollars that they collect back which had been fraudulently received, even though we paid a hundred percent of it to begin with. That's a way to offset their administrative costs.

We permit the states to keep 25 percent of all funds that they collect back that people receive that was not fraudulently identified; in other words, where they just failed to report changes but it wasn't with intent to defraud. So, we provided financial incentives in those areas.

In the last three or four years in trying to address our management of the program, we gave the states additional authority to write verification standards beyond those that are required in the federal law. When I say "those in the federal law," I mean things like citizenship and income and things of that nature. We said to the states: If there are other things that you want to write standards on, verification standards, just so that they're uniform and won't be prejudicially applied by the workers, you may do that, because this became a very large program as this program has now grown, as I indicated in my opening testimony, to an $11-billion program, and each one percent of error translates to $100-million in benefits.

We have been very successful in working with the states and using these new rules and regulations and authority that has been provided to us, and we have seen the error rate [170] over the past year, from '92 to '93, decrease by about 20 percent. So, the error rate is starting to come down, and the states are starting to get in conformity with the nine percent, and this year the seven percent, and next year the five percent.

So, we have been trying to work as joint partners with the states to give them flexibility wherein we can and provide them additional tools and assets in terms of dollars, increased funding, where that's appropriate.

THE COURT: Counsel, we have been in here an hour and twenty minutes. I think we ought to take a break. We'll take ten minutes; and as I told you earlier, we do have a four o'clock hearing on that murder case that's next up.

All right. We'll take ten minutes, please.

(Recess taken from 2:50 p.m. until 3:05 p.m.)

BY MR. HIRT:

Q. Mr. Conrad, before the break, I think you were talking about the states and bringing down error rates.

Does the Department of Agriculture provide any incentives to the states in that process? By "incentives," I mean does the Department of Agriculture furnish any assistance rather than the word "incentives"?

A. In addition to those items that I was testifying to before the break, I would like to point out a couple of other regulatory initiatives that we have taken to address the overpayment problem.

[171] In project areas—and project areas, Your Honor, is usually a county—where there's 100,000 households or more, we have a requirement in those situations that households that are determined eligible would be issued a photo identification card as a part of our verification system to properly identify themselves when they stop in to pick up their food stamps because we've had a problem of people intercepting the instruments that identifies a person for their benefits and then taking those and presenting them falsely to get benefits; so, we've made that available.

In addition, we've not been quite as generous as the Aid to Families with Dependent Children, but we do match the cost of putting in computer systems to manage the food stamp program at a 75 percent rate, when the normal operation of computer assistance is 50 percent; so, we add that incentive.

We have a requirement that if a state exceeds its error rate, meaning if it's above the standard for that year, the next year, they must write a corrective action plan, detailing how they're going to address the various problems that caused the error to exceed the rate. That is submitted to our regional offices, and we assist the states in that process. We have seven regional offices with staff available to assist the state in technical assistance.

This past year, we did two major initiatives in the area of trying to improve the communication among the states to [172] better manage the program. We had the first national welfare commissioners conference where the secretary of the department came and spoke to add this emphasis to our concern about fraud, waste and abuse in the program or

mismanagement—or misexpenditures, I meant to say, not mismanagement.

We had seven regional conferences this past year that focused on fraud investigative techniques, prosecution techniques, claims collection techniques to assist the states; and we developed two communication vehicles: One we called a state to state magazine that goes out quarterly that summarizes good management techniques to the various states so that they can learn from each other; and then, annually, we issue a document that we called "Catalog of Management Improvement," which gives more detail about some 80 to 200 good ideas that other states have used in managing the program because we're concerned that we not pay duplicate funds for the same idea. If one state has already improved its management, have tested an idea, we move forward in that.

In addition, we provided in the last two years in the range of $3- to $6-million of research and demonstration funds each year for states to write up special techniques to improve the management of the program; and we fund those at 100 percent to test out those theories. About two to three years ago, our focus was on verification: How do we improve the cost effectiveness, ways to verify information. At the [173] conclusion of that project, we summarized all of those techniques and communicated to the states so that they would be able to know how to do a better job in verifying the information that comes in.

So, through a series of both regulatory, research and demonstration, as well as technical assistance provided through our regional offices, we've been trying to be an equal partner in the management of the program with the states over the past few years.

Q. Mr. Conrad, coming back for a few minutes to some of the individual ways of matching that you've described, I think that one issue you talked about was the failure of the household to report a change in circumstances; is that correct?

A. That's correct.

Q. How does that failure to report a change in circumstance relate to the possibility of a family being on both Aid

to Families with Dependent Children and the program that you administer, the food stamp program?

A. I guess the clearest way to answer that question would be as follows: We're aware from managing the program that we have two types of problems with reported income. One is the one that you alluded to, families not properly reporting information; and the second one is that we have the problem of the states taking the appropriate action once the information is received.

[174] In some states, the Aid to Families with Dependent Children and the food stamp program would not be administered by the same worker, so a report in one program might be processed but it would not in another. That's why we have joined with the Office of Family Assistance and are very much interested in data management systems like their FAMIS that the previous witness testified about because the unique thing about that type of a data processing system is that, once the information is put in, all programs are automatically updated; and we know that about probably 35 percent of all the errors that occur in the program, the information is made available to the state welfare agency but they fail to take—either to take the appropriate or to take any action on it. So, therefore, that type of a system is very helpful.

The Social Security number, again, in that kind of system is not primary because it's internal to the system, although it's part of a unique identifier across program lines; so, therefore, it's important.

THE COURT: You said that it's internal?

THE WITNESS: Internal, internal to the computer, meaning internal to the system.

THE COURT: Internal?

THE WITNESS: Internal, yes, sir.

THE COURT: All right, fine.

[175] BY MR. HIRT:

Q. You also mentioned two other sources of possible matching, such as school enrollments. Can you describe how that takes place?

A. Yes, sir. It could take place in one of two ways, and it would depend on the state; they have some flexibility there.

The state could—the welfare agency could make its entire food stamp file available to any school jurisdiction, meaning through a computer tape so that they could—through an automated way—match it against their eligibility files of their school lunch children: or the latter way it could be done is probably the more general way: As a part of the school's verification of their school lunch recipients, the three percent that I referenced before, they could make those names of the child, the Social Security number of the child available, and it would be an easy computer cost effective way to verify that the child was receiving food stamps.

The food stamp eligibility threshold is lower than the school lunch program; so, therefore, anybody on the school lunch—anybody on food stamps is automatically eligible for the school lunch program.

Q. Mr. Conrad, based upon your experience in this program, do you have an opinion as to whether Social Security number are essential to its effective operation?

MR. GILDIN: I object to that question, Your Honor. [176] It calls for an opinion; and again, this witness not being an expert witness, that seems to be inappropriate. Also, it seems to call for the ultimate issue in the case, which would be, from a lay witness' standpoint, totally unacceptable under the rules of evidence.

Only experts can testify to the ultimate issue. There was an objection sustained to Professor Drinnon's statement as to whether the belief was religious on that ground, and I think the same rule ought to apply here.

MR. HIRT: May I respond, Your Honor.

THE COURT: I'm not sure that the ruling on the Drinnon matter is precisely the same as this.

MR. HIRT: Well, first, the Drinnon point, my objection was that I doubted whether Mr. Drinnon could give opinions that were based upon looking at Mr. Stephen Roy as a witness and determining religious belief because that went to an issue of credibility, which is for the finder of fact. So, the Drinnon example is completely opposite.

The second point that I would make, Your Honor, is that I don't see any limitation in Rule 701 that says that a lay witness, if I can use that term, cannot speak to what is an ul-

timate issue. I also disagree, Your Honor, as to whether the Social Security number is essential is an ultimate issue in the case. I'm not sure that's a given one way or the other; but rather than taking a firm position on that, I would come back to [177] the same analysis which I used when we argued this point in the context of Mr. Stauffer, which was that the rules of evidence as construed by the Third Circuit, allow testimony by a witness if it's helpful to understanding the testimony or to the determination of a fact at issue.

I think that although we're talking about a legal conclusion, we're still talking about whether these are essential or not, which could be a fact. I don't think that's a legal issue. I think that moreover this witness, although I've not proffered him as an expert witness, for instance in the area of computers, is someone who not only should be able to give a programatic opinion in terms of his administering this program but he also brings to bear, as the testimony clearly shows, his role as the number two and number one person respectively of two separate state departments of public welfare.

I think Mr. Conrad's testimony and opinion is validly received by the Court. The federal defendants really would be handcuffed if we could not give opinion evidence as to why the Social Security number is important and as to its degree of importance.

THE COURT: Rule 704, which relates to opinion on the ultimate issue, does not seem to me to be restricted to experts. It says: Testimony in the form of an opinion or inference otherwise admittable is not objectionable because it embraces an ultimate issue to be decided by the trier of [178] fact. We will overrule the objection.

THE WITNESS: I would respond—I believe I have in my mind the question, Your Honor.

THE COURT: Do you want it read back?

THE WITNESS: It would be helpful, sir.

(The pending question was read back by the reporter.)

THE WITNESS: I want to answer that question in context, in a personal context to my answer on that, and then I'll answer the question. So, I'll answer it and then put it in context if that's preferable.

The answer is yes, and let me place that "yes" in proper context. As we're charged with overseeing and monitoring a federal program, we have to look at that management in the context of that program.

I've indicated in previous testimony that we only take about $98-million to promulgate all the rules and regulations, oversee the program, provide help and assistance to the states, print and distribute the stamps. That's only slightly more than a one percent administrative cost. So, therefore, we're trying to design a very cost effective system.

The Social Security number issue fits in as follows: We're concerned in setting up and designing a system to preclude fraud, waste and abuse creeping into this program. When one percent will cost the American taxpayers $100-million, [179] we have to look at each one of our management systems with that in mind. The Social Security number is essential from the standpoint of being able to cost effectively complete matches, to do federal government interactions, meaning with the Social Security Administration. It's the only way that I'm aware that you can obtain information from banks and nongovernmental entities which are not required to keep names necessarily, are not required to keep birthdates or do not collect that data. So, therefore, the Social Security number is an essential part of that whole system.

It's also essential from the standpoint of addressing individuals who are less scrupulous, that would try to obtain benefits to which they're not entitled, meaning fictitious members of their household and things of that nature. So, it fits from that standpoint.

You cannot answer the question with a simple yes. You have to look at the use of the Social Security number as a part of this bigger system that we manage. So, therefore, it's integral to our computer management of the system, it's integral from the standpoint of being able to access forces external to the government, and it's also essential as an identifier inside of the government to do cross-verification of information through the use of a computer, which can high-speed sort and complete these tasks so that we have more worker time to do the interaction with people and secure the information on the first [180] first.

BY MR. HIRT:

Q. So, Mr. Conrad, why doesn't the computer system use names as identifiers rather than relying upon Social Security numbers:

MR. GILDIN: Objection, Your Honor. It assumes a fact not in evidence. The witness has never said that the computers do not use names. In fact, he's testified frequently that—

THE COURT: He said that he'll strike it.

MR. HIRT: I'll strike it.

MR. GILDIN: Okay.

BY MR. HIRT:

Q. Mr. Conrad, why does the system utilize Social Security numbers as opposed to a situation where they would rely upon names as the means of identification exclusively?

MR. GILDIN: Objection again, Your Honor. Again, this witness has testified that these systems go beyond the Social Security number and have names and birthdates, and that question assumes a contrary state of facts.

THE COURT: I'm going to overrule the objection.

THE WITNESS: The use of names only in carrying out verifications through the use of computers has limited applicability because of the commonality of names, first. Secondly, it would have limited use if the system that you were accessing [181] kept information on the file system other than name. I would think that a name would be common among any system of record keeping. So, therefore, the latter is not as important as the former.

It's not very efficient to match, if there are a hundred Virgil Conrads in the world, and not have a better way to refine the reality to see if an individual with that name is trying to receive benefits to which he is not entitled by not reporting properly the information of his household circumstances. So, therefore, the use of name only is not an efficient to do these types of verification.

Q. Well, why is it a requirement that each individual member of a household provide a Social Security number for each member of that household as opposed to a household member sharing a number with another individual?

A. Well, there's at least two reasons for that; and to begin with, the first that I've referenced in my previous testi-

mony having to do with unearned income and the ability to draw interests on accounts to a unique Social Security number, which is required under the Internal Revenue system, you wouldn't be able to identify those as well as you could with each person's Social Security number.

Secondly, we do have a problem in our program because one of the requirements is that you must be a U.S. citizen. Alien status is not eligible; and we know from our
[182] program that individuals have contrived in the past and used children's numbers to enter the labor market and, therefore, try to make those numbers available.

So, we need to have—we need to avoid duplicate numbers from that standpoint. Any time you have two people with the same number show up in your system, it means that you've got further checking to try to then divide whatever the issue is to each individual; and therefore, that takes more time, and if you can use the computer to do that, it's much more efficient.

Q. Do you have any opinion as to whether the food stamp program should adopt one of the suggestions proffered by the plaintiffs, that of using what they characterize as a unique name for their daughter, Little Bird of the Snow, as the means of identifying her in the system? In other words, do you have a view as to whether that's a feasible alternative?

A. That's an alternative. It's not as feasible and it's not as efficient or as effective as the Social Security number because you have—regardless of the uniqueness of the name, you have the possibility of other people using it.

You may have one of two ways: By just the fact that someone else might choose the same name, regardless of how unique it is; or other people might use it with fraudulent intent, knowing that that name, any time it was used, would not come under the same rigors of investigation because you've set it out as an exception in your system.

[183] Q. Assuming that the plaintiffs in this case were not required to provide a Social Security number for their daughter, do you know how state officials would develop a means of identifying that household or that individual for purposes of program verification and administration?

A. The difficulty would be greater external to the state system than it would be—it would be greater to the state's internal system. Let me see if I can clarify my answer this way: Within the State of Pennsylvania, they might be able to devise a way so that they could cross-check by name from county to county to avoid duplication. They very well may be able to do that; I can't speak as an authority on that.

From past experience, I can tell you that I believe that that could be done, but when they get ready to try to access Social Security and go into different kinds of regimentation of requirements, when they get ready to circulate a computerized tape to a local bank, they're into a different type of regimentation of what is available in terms of cross-checking beyond just the name because the name in and of itself is not an efficient or an effective way as the one sole identifier to a family when we have available the efficiencies that are represented with the computers in today's management.

Q. When you use the term "Social Security," what did you mean by that?

A. Social Security meaning with a—I'm not aware [184] that you can access their information in terms of wage files and benefits associated there, with their end, with just a name. It's numeric in its orientations and requirements; so, therefore, one would have to forego the opportunity to do that.

You could verify that there was or wasn't a number and maybe then deduce from that that they weren't getting benefits; but that's what I was referencing when I said "Social Security," meaning their benefit files.

Q. Assuming that individuals such as these plaintiffs had objections to providing Social Security numbers on religious grounds such as those stated in this case, do you know how a local welfare department would administer the determination of when to give an exception to that household?

A. I would--I guess there's two ways you could do that. One would be: You could construct a rule and regulation that would follow a series of logic that would start with, one, does the individual havve a denominational preference, an orientation, a doctrine or theology that you can look at in support of the statement of their belief; and then, from that more

standard way, one could move to a series of questions of examining the individual about their beliefs to see if they were unique and sincerely held.

Ultimately, then, once that decision is made, the individual is protected because they have a right to an administrative hearing and they have a right for judicial review.

[185] So, I guess, in balance, the individual rights could be protected, starting from the logic of denominational and moving down in criteria. Once the decision is made, if the individual felt it was adverse, then they would have a right of redress.

Q. Do you know whether a local welfare official would have the competence to decide whether someone's beliefs were based upon a religious objection or a nonreligious objection?

A. I believe that under properly guided—with proper guidance and training that a person would have a—some objective capacity to rule in that area. This is very much a subjective area, and it's one that would be difficult to write specific guidelines to fit every unique situation.

Right now, the workers are trained not to discriminate on the basis of race, religion, national origin; all of those factors. So, that's the requirement that they currently have embodied within their job; but in this area, it's most difficult because it goes beyond—if you get beyond what I said is the threshold, the denominational or recognized theology, then you're getting into an individualized situation, the wisdom of which is most difficult for an individual to make.

Q. Based upon that testimony, do you believe that it would be a costly administrative system to create and administrate to resolve these questions successfully?

A. I believe that greater detail of training and [186] procedure writing than is currently available would be required; and yes, I believe that would be costly.

MR. HIRT: I have no further questions.

THE COURT: All right. Any questions, Mr. Ressler?

MR. RESSLER: None, Your Honor.

• • • • •

[193] CROSS EXAMINATION

BY MR. GILDIN:

Q. Just one last procedural matter, Mr. Conrad, are you going to be able to be here tomorrow morning at eight?

[194] A. I would prefer not to be since I have a duty to—my first duty is to the bench and this Court; and if I have to be here in the morning, if we can't finish before, I will be here; but I have a speaking—a standing speaking engagement tomorrow in Harrisburg, and it's going to be most difficult if I'm not there at ten o'clock in the morning.

I want to properly respond to your questions and be available to the defendant, so I'll take the directions of the Court.

Q. Thank you. Maybe to expedite matters, you were here Friday when I was examining Mr. Stauffer; isn't that correct?

A. Yes, sir.

Q. So, you're familiar with a little more about this case—

A. Yes, sir.

Q. —in terms of the agreed facts, and maybe that will speed things up.

A. Yes.

Q. You stated that one of the general purposes of the Social Security number requirement was to ensure that there is no fraud and abuse of the system; correct?

A. Yes, sir.

Q. But you, as Mr. Stauffer, would agree that under the facts of this case, everyone agrees that Mr. Roy and his [196] family are entitled to the food stamps which you propose to terminate; correct?

MR. HIRT: Your Honor—

THE COURT: Yes, sir.

MR. HIRT: Your Honor, to expedite matters, I want to make clear that I have the same line of objections that I raised in the context of Mr. Stauffer, which is: Fraud at this point in time is not the issue. There could be potential fraud by this family at any point down the line.

THE COURT: What's your view?

MR. GILDIN: We've been through this whole litany of objections. We're asking him about the facts of this case as

they stand right now. They're trying to terminate this man right now.

THE COURT: We'll overrule the objection

BY MR. GILDIN:

Q. Let me ask the question again, Mr. Conrad. Based upon the facts of this case, there is no dispute that based upon financial requirements that Little Bird of the Snow is, in fact, eligible for food stamps; correct?

A. Correct.

Q. And the only reason you're trying to cut her off of those food stamps is the failure to provide the Social Security number.

A. Correct.

[196] Q. Similarly, with respect to the general purpose of duplication of benefits, that very simply stated is that if someone would receive double the food stamps they're entitled to in a month, that would be a problem; correct?

A. Correct.

Q. And that's only a problem if they don't come back to the food stamp office and say, "You overpaid us"; isn't that right?

A. Not necessarily.

Q. So, if the person who had received duplicate payments came back to the local food stamp office and said, "here are the extra payments back," you'd consider that a problem still?

A. It could be. It could be from the standpoint that if they received benefits to which they're not entitled and an error has occurred, it could fit into the state's requirement of calculating their error rate, so it could have a greater consequence than just paying the money back.

Q. But in terms of the amount of food stamps that were wrongfully paid out, that has no effect on that number; does it?

A. Not on that individual case, but it could be part of a statistical representation.

Q. So, the duplication problem may be because of its statistical representation in your opinion.

A. Correct.

[197] Q. Let's look again, as we did with Mr. Stauffer, as to how you use the Social Security number to fulfill these purposes.

Now, did you testify here today that you use them to make sure that the beneficiary is not receiving the same benefits in another jurisdiction?

A. Correct.

Q. And just like the Aid to Families with Dependent Children program, in order for a child to receive food stamps, the parent or other adult in the household has to provide his or her Social Security number; right?

A. Correct.

Q. So, for Little Bird of the Snow Roy, Stephen Roy and Karen Miller will be required to provide their Social Security numbers as a condition of receiving food stamps for their daughter; is that correct?

A. As long as she's in their household, yes.

Q. And it's undisputed in this case, again, and you'll agree, I'm sure, that these numbers have been provided by Mr. Roy and Ms. Miller; correct?

A. That's correct.

Q. Just as I asked Mr. Stauffer, at age three, it's rather unlikely that, in this case, Litle Bird of the Snow is going to apply for or receive food stamps from an office without her parents or other adult being there.

[198] A. Not necessarily.

Q. The local office will award food stamps to a three-year-old girl who walks in—

A. Someone else might use that name and make application and represent—

Q. My question, sir, is: If Little Bird of the Snow Roy, Mr. Roy's daughter, who is now age three, walked into a local welfare office, they would not—I'm sorry, a food stamp office—they would not give her food stamps; would they?

A. That's correct.

Q. They'd ask for a parent or adult's Social Security number.

A. That's correct.

Q. You talked about that you're going to use the Social Security number to coordinate these food stamp benefits with other welfare programs; is that correct?

A. Yes, sir.

Q. One of those programs is the Aid to Families with Dependent Children program that Mr. Stauffer testified about.

A. Correct.

Q. And you heard him say that, just as in your food stamp program, they require the parent to provide a Social Security number as a condition of getting benefits for their child.

A. Correct.

[199] Q. You also mentioned that the states use the Social Security number to match the food stamp recipient to employment information.

A. Correct.

Q. One of those things is to find out if someone is earning any wages; is that correct?

A. Correct.

Q. At age three, Little Bird of the Snow Roy is not employed; is she?

A. Probably not.

Q. That's probably not for another 13 years; correct?

A. As we currently understand the law.

Q. So, with respect to employment information, your concern in this case for now and for another 13 years is to find out whether the parents have any income from employment; correct?

A. That's correct.

Q. You also talked about matching against unemployment compensation funds.

A. Correct.

Q. Just in the same way that you're not going to be worried about Little Bird of the Snow getting wages for 13 years, for the same reason, she won't be getting unemployment compensation for that same period of time.

A. That is correct.

[200] Q. Then, you talked about the Social Security number being used to detect nonexistent children; correct?

A. Correct.

Q. But again, with respect to the facts of this case, there's no concern that Little Bird of the Snow Roy is a non-existent child; correct?

A. Correct.

Q. Then, you talked about the use of the Social Security number to check out the work registration program; correct?

A. Correct.

Q. Now, as I read the statute, the work registration program for the Food Stamp Act applies to physically and mentally fit persons between the ages of 18 and 60.

A. That's correct.

Q. So, for Little Bird of the Snow Roy, this wouldn't apply for another 15 years; correct?

A. Correct.

Q. You also talked about using the Social Security number for the Workfare Program.

A. No, sir, I don't believe I testified about that today.

Q. Okay.

A. It's in my affidavit, but not today.

Q. It is one of the uses; is it not?

[201] A. Correct, sir.

Q. Just like the work registration program, Workfare only becomes relevant when the child reaches age 18.

A. Sixteen to eighteen, if they're not in school, they could be required to work.

Q. So, again, with respect to Little Bird of the Snow, we're talking about another—what?—13 to 15 years before this becomes important.

A. Yes, sir.

Q. Let's talk a little bit about the use of the Social Security number itself.

In your view, the Social Security number is essential; correct?

A. That's right, sir.

Q. Social Security numbers aren't a perfect means of identification, though; are they?

A. Perfect?

Q. Right.

A. I guess when you use the term "perfect," you mean a hundred percent, always accurate.

Q. That's right.

A. Anything that has humans involved has an error factor in it, so my answer is no.

Q. I guess that even though you require the Social Security number now with respect to all applicants, you're still [202] running at an error rate of nine to ten percent; correct?

MR. HIRT: Your Honor, objection. I don't see the relevance of there being an error rate to whether Social Security numbers are required or not required in terms of what the plaintiffs are asking this witness.

THE COURT: What's your view, counsel?

MR. GILDIN: Your Honor, it goes to how well this number, in fact, serves its purposes, which in turn dictates what will happen if one individual is exempted from the program.

THE COURT: We'll overrule the objection.

THE WITNESS: Would you restate the question?

MR. GILDIN: Would the court reporter please read that question back?

(The pending question was read back by the reporter.)

THE WITNESS: No.

BY. MR. GILDIN:

Q. What is your current error rate nationally, sir?

A. The most recent error rate that we're going through verification on is approximately 8.55 percent.

Q. And that's in a system that uses the Social Security number as a verification device.

A. Yes, sir.

Q. Now, you talked about that the only central file that the United States Department of Agriculture keeps is on [203] disqualified persons; correct?

A. Yes, sir.

Q. In each person's file, you have their name, Social Security number, birthdate, and maybe, you said, their address; correct?

A. Correct.

Q. Do you have any Little Bird of the Snow Roys in that file?

A. Not to my knowledge.

Q. Now, when you say not to your knowledge, is that a statement that you know there are none in there?

A. I said not to my knowledge because I don't know of every name that's in there.

Q. Did you ever check to find out if there are any Little Bird of the Snow Roys there?

A. I have not.

Q. This is the one central file that you keep.

A. I believe I testified that there was another file referred to as the quality control system, where we get information on, but that's a different kind of file for statistical projections and financial accountability.

Q. When you talked about how the Social Security number was used by the state, you stated that it was part of an automated system for identification; correct?

A. Yes, I believe that's true.

[204] Q. And there was secondary information, which included the name and the birthdate; correct?

A. Correct.

Q. Now, with respect to the systems used by the state, are you aware of more than one Little Bird of the Snow Roy in any of those systems?

A. I wouldn't have any firsthand knowledge if there's more than one.

Q. Did you ever check that?

A. No, sir, I have not queried and no one on my staff has queried the 50 states and territories to see if there's another one of the 21 million recipients by that name.

Q. Did either you or your staff look anywhere to determine whether there's more than one Little Bird of the Snow Roy?

A. Not to my knowledge.

Q. And you never asked anybody to do that?

A. I never asked anybody to check the 50 states because we don't have a national system. We have not checked the 50 states is the point I'm making, sir.

Q. My question is: Did you check anywhere in any of these files to determine whether there was more than one Little Bird of the Snow Roy?

A. I believe I've answered that. I did not.

Q. Now, when you talked about the wage matching, it [205] was your understanding that the Social Security number was used in the wage match; is that correct?

A. That's correct, sir.

Q. I think you said that the Social Security number was a primary factor.

A. Primary meaning the—in the same vein of discussion that the previous witness testified about primary and secondary, used in that context, meaning that it is the most reliable of a series of identifiers.

Q. But I believe you were the one that said the Social Security number was at times subject to error because of transpositional types of mistakes that could be made in recording that number.

A. I said that transpositional—it would not be a perfect system; it would be subject to verification. To clarify, also the Social Security number can be possibly issued to more than two people, so you have to verify; but once it's verified, it's a very reliable system.

Q. But just to be sure, these systems also use the name and birthdate and the sex and some other factors to determine the verification.

A. Yes, sir.

Q. I believe you stated that the error rate goal in fiscal year 1983 is nine percent or less.

A. Yes, sir.

[206] Q. This is compared to the total dollars expended for the program?

A. Yes, sir.

Q. It's your goal, hopefully by fiscal year 1985, to reduce that error rate to five percent.

A. For each state or less, yes, sir.

Q. So, if we just use your most recent figure, that you spent $769-million on the reimbursement to the grocers for the food stamps, that five percent would be somewhere in the neighborhood of $38-million.

A. No, sir, you got the wrong figure. The error rate is applied to the benefits, which is $10.2-billion. The 769 is the administrative costs matching to the state.

Q. So, it would be five percent of that $10.2-billion, which would be the error rate hopefully for fiscal year 1985.

A. As a national standard applied to each state.

Q. Now, again with respect to this matching program, you stated that the United States Department of Agriculture is

interested in this FAMIS system described by Mr. Stauffer but it's not now in place; correct?

A. It's not now in place in the Commonwealth of Pennsylvania. They're moving to put it in place.

Q. It was your understanding of the system that the Social Security number is part of the matching process under that sort of system; correct?

[207] A. It's one of the qualifiers that are used in matches, yes.

Q. Other qualifiers include things such as names and birthdates; correct?

A. I believe that's correct, yes, sir.

Q. And addresses and sex and race; correct?

A. Not necessarily on all the different kinds of matches, but it could go to that detail.

Q. Now, you stated that you believe the use of names only has a limited application because names are common among any system. That's true as a general matter; correct?

A. That's correct.

Q. But again, as you stated here today, you have no personal knowledge as to whether there's another Little Bird of the Snow Roy anywhere; do you?

A. No, I do not.

Q. You stated at some point that the Social Security number is required by the Internal Revenue Service.

A. I stated that a Social Security number in a wage match, a person having wages is required, and therefore, you have to report your wages to an internal revenue system, meaning a state tax system, and that's a secondary system that we can use for matching. That's what I was trying to say in that answer.

Q. But there may be people who pay money into the [208] internal revenue system who do not have a Social Security number.

A. That's correct. I believe that's possible.

Q. Now, if there were two people with the same name—and we can only say "if" now with respect to Little Bird of the Snow Roy—your complaint was that you would have to require further checking; right?

A. The ability to determine that is lessened if you don't have primary identifiers like a numeric Social Security number.

Q. And the problem with that is that it takes more time; right?

A. That's right, it would be more labor intense, yes, sir; and there are some systems that currently you could not match against.

Q. Now, you said that one of those was the Social Security's.

A. I said that to my knowledge I do not believe that you would be able to access such things as bank records.

Q. It's the bank records you're referring to.

A. Yes, sir.

Q. That's one of those private sources that you're hoping to extend the system to.

A. Not hoping; the states are required to.

Q. Now, you stated with respect to this administrative [209] system of allowing hearing examiners to determine whether a belief was religious or sincere that would be in your view very, very difficult; correct?

A. I stated that first you would start with a manual instruction and proper training of your staff like you do on any regulatory requirement; and once that's executed, that the recipient or the potential applicant is then further protected in our system because they have a due process right to an administrative hearing and judicial review was the context I was trying to place my answer.

Q. Are you aware, sir, that in this case the Department of Welfare Hearing Examiner did, in fact, determine that Mr. Roy's objection to the Social Security number was both religious and sincere?

MR. HIRT: Objection, Your Honor. There's no relevance to what this particular individual found or did not find.

MR. GILDIN: Your Honor, he said that he doesn't think it's possible without retraining. The system is in place in a sense right now.

THE COURT: I'll overrule the objection.

THE WITNESS: I'm aware that the administrative officer found two things: One, he found that in their opinion that

the beliefs were religious but they did not exempt the requirement under their understanding of the rules and the laws [210] of the land.

BY MR. GILDIN:

Q. Correct, sir; and the hearing examiner, who was Sara Metzler, also found that the belief was sincere; correct?

A. I believe that's true, yes, sir.

Q. Little Bird of the Snow Roy is now receiving food stamps; correct?

A. Yes, sir.

Q. And she's receiving them without a Social Security number for herself; isn't she?

A. Yes, sir.

Q. Are you aware of any threat to the workability of the statutory scheme currently?

A. I think I've testified—

MR. HIRT: Objection.

THE COURT: Wait a minute, sir, there's an objection.

MR. HIRT: Your Honor, it's undisputed that she's still receiving benefits, but that's obviously because no proceedings have been initiated in part because of this court case to terminate her. So, I object to the relevance of this question.

We know what the facts are and why they're the way they are.

THE COURT: But that's not what his question was. [211] As I understood it, his question is: Does the fact that she is getting these stamps present any threat, I believe, to the governmental fist, although I do not know what the last phrase was. So, I'll overrule the objection.

MR. GILDIN: Would you read back the question, please?

(The pending question was read back by the reporter.)

THE WITNESS: There aren't any because we haven't executed any negative action against Little Bird of the Snow.

BY MR. GILDIN:

Q. Now, sir, the purpose of this food stamp program is to be sure that low income households can get a nutritionally adequate diet by increasing their ability to purchase food; correct?

A. If they're eligible, yes.

Q. And the assumption is that, without the food stamps, these people won't have enough money to purchase the food to obtain the desired level or proper level of nutrition for their family; correct?

A. Correct.

Q. So, if a family met the financial requirements for the food stamp program but still did not receive food stamps, they would not be able to buy enough food to feed their family; would they?

[212] MR. HIRT: Objection.

THE WITNESS: Not necessarily.

MR. HIRT: I had an objection.

THE COURT: What?

MR. HIRT: I had an objection, which is that I think he's asking the witness to speculate as to what each individual household may or may not be able to do.

THE COURT: What's your view?

MR. GILDIN: I'm just asking him his understanding of how the purposes of the food stamp program would be affected if they denied stamps to a family that's needy.

THE COURT: Well, I'll sustain the objection. It's now 33 seconds after four o'clock. How much longer do you expect to be?

MR. GILDIN: Your Honor, I'm going to go a couple of minutes. I've been trying to go as quickly as possible so that Mr. Conrad can hopefully meet this speaking engagement.

THE COURT: All right. Do you think you can finish within five minutes?

MR. GILDIN: I certainly hope so, Your Honor.

THE WITNESS: Do I need to answer the last question, Your Honor? I sort of lost track of where we're at.

THE COURT: You can go ahead. She'll read it back to you.

THE COURT REPORTER: I believe you sustained the [213] objection.

THE COURT: I'm sorry. I did sustain the objection.

THE WITNESS: I'm sorry, Your Honor.

THE COURT: You don't need to try to answer it.

THE WITNESS: All right. I'm conserving time.

THE COURT: We are running out of time. I just want to know whether the defendants are going to put somebody on this stand to whom I can ask the question of whether or not the Social Security number of 515-941-802 is available.

MR. HIRT: Yes, Your Honor, tomorrow morning.

THE COURT: All right. Well, that's fine. I think that may solve this whole thing.

MR. GILDIN: How about if we finish with the witness; and before we adjourn, I would like to address that point.

THE COURT: Well, I don't think we can let you address that point today.

MR. GILDIN: No, okay. I'm not positive, Your Honor, that you understood whether Mr. Roy would still have an objection.

THE COURT: Well, when I asked him, he said he would, and that may have some considerable bearing on how the case goes.

Now, I'm willing to hear closing argument on it, [214] but we've got—I see counsel out in the hall, they legitimately expect to start today at four o'clock, we're not late, and I don't think I can hear argument on that today.

BY MR. GILDIN:

Q. Mr. Conrad, are you aware of what the Department of Health and Human Services did after the Court ordered them in Stevens versus Berger—

A. No, sir, I am not.

Q. Please let me finish my question.

A. Oh.

Q. —to continue to provide benefits for the Stevens children without Social Security numbers?

A. No, sir, I'm not aware of whether they did or did not continue that.

Q. Well, they were ordered to continue benefits. The question was: Do you know what modifications they made to their system to do so?

A. The answer is: No, sir, I do not.

Q. Do you know what effect the Court's order had on the ability of the statutory scheme to continue for the Stevens?

A. No, sir, I have no knowledge of any impact upon the administration of their program.

MR. GILDIN: That's it, Your Honor, thank you.
THE COURT: Do you have any redirect?
MR. HIRT: I have one question on redirect.

[215] **REDIRECT EXAMINATION**

BY MR. HIRT:

Q. Mr. Conrad, you've talked about that there's an 8.5 percent error rate, yet Social Security numbers are required from recipients.

If the Social Security number requirement in the statute were abrogated, do you have an opinion as to whether that error rate would rise or fall?

MR. GILDIN: Objection, Your Honor. The relevance is if it were abrogated for one individual.

THE COURT: All right. I'll sustain the objection. Very well. Do you have any other questions?

MR. HIRT: No, Your Honor.

THE COURT: All right. You may step down, sir, and you may be excused for the day.

MR. MILES: Your Honor, one very quick procedural question: With respect to further suggested findings of fact and conclusions of law, what's the Court's procedure? Should those be submitted tomorrow?

We have extensive ones in our pre-trial documents, but should those be submitted at the close of closing arguments tomorrow?

THE COURT: At the close of all the evidence, if you have additional findings that you wish to submit or additional conclusions of law, we'll be glad to take them; and they [216] may be handprinted, typewritten or legibly handwritten.

MR. HIRT: Your Honor, I didn't catch that last phrase. What did you say?

THE COURT: They may be typewritten, handprinted or legibly handwritten.

It's now four minutes after four. Is government counsel available?

MR. REIDERS: Yes, Your Honor, they're here.

(Court adjourned at 4:04 p.m.)

[217] **INDEX TO WITNESSES**

For U.S. Defendants:	*Direct*	*Cross*	*Redirect*	*Recross*
Robert G. Stauffer				
By Mr. Hirt (cont'd):			116	
By Mr. Gildin				133
Virgil L. Conrad				
By Mr. Hirt	143		215	
By Mr. Gildin		193		

INDEX TO EXHIBITS

U.S. Defendants' Exhibits	*Identified*	*Admitted*
No. 1—The automated guide	129	—

JOINT

APPENDIX

Office Supreme Court, U.S.
FILED
JUL 30 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-780

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

STEPHEN J. ROY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOINT APPENDIX

GARY S. GILDEN
150 South College Street
Carlisle, Pennsylvania 17013
(717) 243-4611

FRANKLIN A. MILES
100 Pine Street
P.O. Box 1166
Harrisburg, Pennsylvania 17108
(717) 232-8000
Counsel for Appellees Roy and Miller

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Appellants

JOEL M. REBLER
Deputy Attorney General
Commonwealth of Pennsylvania
Office of the Attorney General
Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 783-1471
Counsel for Appellee Cohen

JURISDICTIONAL STATEMENT FILED NOVEMBER 13, 1984
PROBABLE JURISDICTION NOTED JUNE 17, 1985
Volume II

BEST AVAILABLE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-780

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

STEPHEN J. ROY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

INDEX*

	Page
Chronological List of Relevant Docket Entries from the United States District Court for the Middle District of Pennsylvania	1
Comprehensive Statement of Undisputed Facts	13
Affidavit of Philip Harant, Director of the Division of Earnings Systems, Social Security Administration, Department of Health and Human Services, dated February 14, 1984	21
Affidavit of Harris G. Factor, Director of the Office of Regulations, Social Security Administration, Department of Health and Human Services, dated February 14, 1984	25
Declaration of Virgil Conrad, Deputy Administrator of the Family Nutrition Programs, Food and Nutrition Service, United States Department of Agriculture, dated February 22, 1984	33
Trial Transcript, May 17-18, 21-22, 1984	39
Order noting probable jurisdiction	328

* Pursuant to Rule 30.1 of the Rules of this Court, the Opinion and Order of the District Court, dated June 22, 1984, and its Opinion and Order denying the parties' motions for summary judgment, dated May 15, 1984, have been reproduced in the appendix to the jurisdictional statement.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CA No. 83-1179

STEPHEN J. ROY, AND KAREN MILLER, PLAINTIFFS

vs.

COHEN, WALTER, SECRETARY OF THE PA. DEPT. OF PUBLIC WELFARE; HECKLER, MARGARET, SECRETARY OF THE U.S. DEPT. OF HEALTH AND HUMAN SERVICES; AND BLOCK, JOHN, SECRETARY OF THE U.S. DEPT. OF AGRICULTURE, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, DEFENDANTS

BEFORE: Honorable Malcolm Muir
PLACE: Williamsport, PA
PROCEEDINGS: Non-jury trial
DATE: May 22, 1984—Morning Session

---

[3] (Court reconvened at 8:30 a.m.)

THE COURT: I thought we finished the testimony of a witness, but I'm not sure. Did we finish with Mr. Conrad?

MR. HIRT: Yes, Your Honor.

THE COURT: Do you wish to call another witness, counsel?

MR. HIRT: Yes, Your Honor. Mr. Hanger, please approach the stand.

ROBERT B. HANGER,

called as a witness on behalf of the defendants, having been first duly sworn according to law, testified as follows:

EXAMINATION

BY THE COURT:

Q. Would you give me your last name, sir?

A. It's Hanger, H-a-n-g-e-r.

Q. I couldn't get the first letter.

A. "H."

Q. As in Howard?

A. That's right.

Q. Your first name, sir?

A. Robert.

Q. Do you use a middle initial?

A. Yes, "B" as in boy.

Q. Is it Hanger, did you say?

[4] A. Yes, sir.

Q. Where do you live, sir?

A. I live in Reisterstown, Maryland. My address is 11723 Terrytown Drive.

Q. What is your occupation, sir?

A. My title is supervisory computer systems analyst.

Q. Supervisory computer systems analyst.

A. Yes, sir.

Q. Okay. Now, are you with the federal government?

A. Yes, I am.

Q. What department?

A. I'm with the Social Security Administration.

Q. I see, and how long have you been in the computer field?

A. Nineteen years.

THE COURT: Thank you. You may go ahead, counsel.

MR. HIRT: Thank you.

DIRECT EXAMINATION

BY MR. HIRT:

Q. Mr. Hanger, how long have you worked for the Social Security Administration?

A. Since 1971.

Q. What is your educational background briefly?

A. I have a bachelor of science, and in January, I [5] started a master's program in computer science management.

Q. Prior to your present position at the Social Security Administration, what other employment have you had?

A. With the government?

Q. Yes, start there if you could.

A. I've worked as a computer—as a systems analyst, excuse me; a computer specialist and a programer.

Q. What organizations were you working for?

A. With Social Security Administration, I've only worked in—or I've only worked with—in the division of earnings systems.

Q. What is your current title again?

A. Supervisory computer systems analyst.

Q. In what division of the Social Security Administration is that position located?

A. It's the division of earnings systems, and I'm the acting branch chief of the enumerations systems branch.

THE COURT: The acting what?

THE WITNESS: Branch chief.

BY MR. HIRT:

Q. Who is your current supervisor?

A. Frank Fitzpatrick is currently my supervisor.

Q. How long has he been your supervisor?

A. Since last Monday.

Q. Prior to that, who was your supervisor?

[6] A. Phil Harant.

Q. Can you describe briefly what responsibilities you have under your current job position?

A. Yes. The enumerations systems branch is a branch that's responsible for maintaining software, dealing with the issuance of Social Security numbers and the maintenance of certain files associated with those numbers and the distribution of information.

The branch itself is composed of two section chiefs, which are supervisors, and approximately 18 analysts and programmers.

Q. Before going into detail of what your office does, have you had any training on computers?

A. Yes, I have.

Q. Would you describe that briefly?

A. Yes. The training I've received started approximately 19 years ago. My first job in data processing was with the government; and I received formalized training in several computer languages: ALC, COBOL and RPG. I've had several systems analysis courses given by the government, data design courses, telecommunications courses, several structured analysis, that sort of thing, probably 30 different courses that are rather specific in the last 19 years.

Q. Are you familiar with the process by which the federal government assigns Social Security numbers to [7] individuals.

A. Yes, sir.

Q. Does your office have any role in that assignment process?

A. We maintain and develop software in that area.

Q. How does the request for a Social Security number originate?

A. There are really two ways. Quite generally, a request initiates with an applicant—with the public desiring a Social Security number. There's two ways to get one. The most general way is the individual, guardian or parent will fill out an application in a district office. There are approximately 500 district offices in the United States dealing with Social Security. They fill out an application. The application is the SS-5; I think some people have already mentioned that.

They must also provide identity—proof of identity. That will tend to be birth certificates, baptismal records, that sort

of thing. That's the general—well, wait, I'm sorry. There's one other method.

There are 37 states which have reciprocal agreements with the Social Security Administration as far as the—preparing the application for the Social Security number; and these deal with welfare situations. In these 37 states, the state welfare agency itself may perform the various clerical and administrative jobs to insure that the applications are filled [8] out properly and proper proof is provided.

Q. Once an individual has filled out an application for a Social Security number under either of these two types of situations, what happens next in the process briefly?

A. Okay. Again, there's two ways of getting it into the system, if I can use that term. If the application came from a district office, all district offices are equipped with terminals which are linked by phone line to central office in Baltimore. After the application has been filled out and reviewed and certified, this application is taken to a terminal by some sort of data entry clerk and it is keyed into a terminal. It is then that various on-line edits are performed to insure that all information is there. We have legitimate dates of birth, for instance. When the names are provided, that they are legitimate. You know, a name doesn't begin with a space, that sort of thing.

This is transmitted to the Social Security Administration. It's spooled—it's written to a disc, a large disc file; and at the end of the day, the information is taken—the track of information is spooled from this disc on the tape and distributed into various operations. There's more than just enumeration applications that are being processed on this.

THE COURT: Excuse me. Describe for me what an edit is. I think I know, but I'm not sure.

THE WITNESS: Well, one of the—or two of the [9] fields that are on the SS-5 itself are date of birth and age; and one of the on-line edits that are performed is to insure that the date of birth and the age, as reported on the document, are correct. There's a one-year tolerance built into this.

THE COURT: Well, what is an edit?

THE WITNESS: Well, that's a review of the information to insure that the information is correct. In the situation that someone put down that the birthdate was 1983 and then put their age as 25, the transmission would be halted and—well, in fact, they would not be able to transmit that application at all, and there would be an indication to the operator that there was a potential problem.

Now, they would review it. If there was a transcription error or a keying error by the clerk, they would take care of it at that point.

THE COURT: Well, is an edit a check—

THE WITNESS: Yes, sir.

THE COURT: —as distinguished from an excision?

THE WITNESS: I'm sorry.

THE COURT: As distinguished from an excision.

THE WITNESS: I'm not sure what an excision is.

THE COURT: Well, cutting it out. It's the same word as "scissor."

THE WITNESS: It's a check.

THE COURT: It's a check.

[10] THE WITNESS: Yes, sir.

BY MR. HIRT:

Q. In terms of the process you just described, that was for the welfare department situation?

A. No, that's for the standard—for the regular applications.

The situation with the welfare offices, the state welfare offices, is that on a daily basis, after receiving the receipts of the applications and reviewing them and certifying that the information is correct, these are batched together and sent to one of two data operations centers. All applications east of the Mississippi are sent to Wilkes-Barre, Pennsylvania; everything west of the Mississippi is sent to Albuquerque, New Mexico, Data Operations Center.

Now, at the data operations center, these are controlled as they come in in the mail; they are batched; they are reviewed to insure that all information has been filled out; they are given to a—they are distributed to data entry clerks and these are keyed on four phase equipment, and they go from—they initially key them to a disc, they're dumped to

tape, and at the end of the day, these items are transmitted to us; and this is a separate transmission from the—or a separate type of transmission from the type that is being done from the district offices. This is a transmission of tape to tape.

THE COURT: You said "four phase." I don't know [11] what—

THE WITNESS: Four Phase is data entry equipment; it's a specific type of data entry equipment.

THE COURT: I don't know what it means, though. What's "four phase"?

THE WITNESS: "Four Phase" is actually the name of the vendor.

THE COURT: I see, all right.

BY MR. HIRT:

Q. Mr. Hanger, what is the volume of applications that are received by your office in terms of—if you can give a weekly basis or a daily basis.

A. It's normally a quarter of a million applications per week, and they tend to be anywhere from 25,000 to 50,000 per day.

Q. Briefly, Mr. Hanger, once the data comes in from either of these two methods, how is a Social Security number assigned to an individual?

A. All right. An application or an SS-5, there are two types: The situation where there's no number in the individual's hand and they are requesting a number; and there's a situation where the applicant alleges a Social Security number, and generally, that alleged number is provided.

Our first step is to get all of the applications into the system. We do a couple of things at this point. We do [12] some rediting of the information from the data operations center. Actually, this is the first time that we edit it. We do product exception types in which case an item would be sent back to the data operations center.

Following the editing, we maintain a data base of approximately 2,000 application—or excuse me—two million applications; and we do it for a couple of reasons. I think I'll get into that in a few minutes. As we—immediately before adding this record to the data base, we assign a data control

number. This data control number is an 11-digit number consisting of a Julian date, which is—

Q. What does that mean, the term "Julian date"?

THE COURT: I know what it means.

MR. HIRT: Okay.

THE WITNESS: A Julian date and the serial number; and the Julian date is the date of the transmission itself. Now, we add this record to the data base. We pass it from this data base control system, and actually, this is used for tracking and control of the application.

Electronic systems are notorious for losing records. This is really to insure that we do not in any way drop a record.

Following adding the record to our control data base, we bring the record into processing; and we have two files and I'm responsible for two master files, and one of them is [13] based upon—primarily on the name of the individual, and I call that and we call that the Alphadent file.

THE COURT: Alphadent, A-l-p-h-a-d-e-n-t?

THE WITNESS: That's correct.

THE COURT: How is the designation arrived at? What does the "dent" mean?

THE WITNESS: Identity.

BY MR. HIRT:

Q. Mr. Hanger, could you briefly describe what that file consists of?

A. Yes. This file is for—contains name information for individuals that have Social Security numbers. The sequence of this file, if I can give that to you—I think it's important—it's a serial file, it's a sequential file. It's currently maintained on tape.

THE COURT: When you say it's serial and sequential, I don't know whether it's sequential alphabetically or numerically.

THE WITNESS: Alphabetically.

THE COURT: All right, and then is it subdivided numerically? Once you get the name, is it subdivided numerically?

THE WITNESS: No.

THE COURT: It is not?

THE WITNESS: No.

[14] THE COURT: So, if you had 50 Malcolm Muirs, then you would not have the Malcolm Muirs arranged in numerical order.

THE WITNESS: That's correct. Well, if we had 50 Malcolm Muirs with all the same identity, the same identifying information, within that we would put the account number, the Social Security numbers in order.

THE COURT: That's what I mean.

THE WITNESS: Okay, I'm sorry. The sequence of this file is Soundex, the first letter of the surname in Soundex, seven characters of the first name, the middle initial, the date of birth, the second through 12th characters of the surname.

THE COURT: Now, you lost me.

THE WITNESS: Okay.

THE COURT: You say the seven characters for *i* in first name; is that what you said?

THE WITNESS: Yes, sir.

THE COURT: What do you do if you have the name "Mary"? Do you have the sequence with three zeroes?

THE WITNESS: That's correct. Okay, let's see. Following the 12 characters of the surname, the 2 through 12, we have the second and third letters of the middle name. If we had a middle initial only, this would be blank. We carry four positions of the mother's maiden name, four positions of the father's first name.

[15] THE COURT: I don't know what you mean by positions.

THE WITNESS: I'm sorry. Characters.

THE COURT: Characters, all right.

THE WITNESS: That's the basic sequence of this file. We carry additional information: We would have an account number, the data control number that I mentioned earlier, an indication of foreign birth, place of birth which consists of city or county and state or country of birth, the district office code, the date that the record was added to the Alphadent file and sex/race information. I think that's basically all the information.

THE COURT: I didn't get the last word. You used an adjective before "information." I couldn't tell what it was.

THE WITNESS: I've lost it; I'm sorry.

THE COURT: Right near the end.

A portion of the preceding answer was read back by the reporter.)

THE COURT: Okay, that's the word.

BY MR. HIRT:

Q. Mr. Hanger, I think you testified that your office maintains other files. What is the other file that you mentioned?

A. The other file is something that we call a Numident file.

THE COURT: A what?

[16] THE WITNESS: Numident.

THE COURT: All right.

THE WITNESS: This is basically the Social Security number file, and it is a Social Security number or all transactions—all enumeration transactions which have come in against a Social Security number are maintained on this file.

For instance, the original application would be there, and in the case of people changing their names because of marriages and so forth, that sort of thing, or subsequent applications would be maintained under this account number.

There are approximately 300 million Social Security numbers that have been issued. The Numident file has 390 separate records—390 million separate records. The Alphadent file has approximately 396 million entries.

BY MR. HIRT:

Q. In terms of these two master files that you have talked about, how is the Alphadent file used?

A. With the initial screening of the applications; the applications as they're filled out by the applicants can have multiple names on them. They can have the name that they want the card established under, imprinted with on; they can have the name at birth or the name that was last—that an application was last applied under; and they can have a signature. Now, the applications themselves can have multiple other names. We receive, for screening purposes, only the three names.

[17] Q. In terms of the Numident file—

A. I'm not sure I answered your question.

Q. I asked you what it was used for—
A. I'm sorry.
Q. —and maybe I should add in terms of accessing.
A. Okay, I don't think I did answer you.
Q. Okay.
A. The application itself is—we develop screening records from the application, and the records are based upon the number of names that are provided, so that it's possible—especially in the case of women—that you'll have multiple surnames involved, so that we will—we develop a record for each name, each unique name that's there, and we'll screen against that portion of the Alphadent file.

If we agree—if we can find a match on at least the Soundex first name, surname, middle name and—or middle initial and date of birth, we consider these a potential number for that applicant. If we agree on all of that information plus the mother and father's name—

THE COURT: You lost me when you said that you agreed upon a potential number. I could understand everything up to that potential number.

THE WITNESS: If the application—if we can find an Alphadent record that matches that application on the Soundex first name, surname, middle initial, date of birth, we [18] consider the number that's on the Alphadent as potentially belonging to that individual.

Now, we could have multiple situations in this case. It's not unusual to have—well, for instance, there are 272 Linda Smiths that were born in September of 1947. Now, that's—in the case of Linda Smith, we stand a large—well, we stand a chance of finding multiple numbers—excuse me, possible multiple numbers.

Now, we don't stop screening just because we've agreed on the information through the middle initial. If it agrees on the rest of the middle name, that is the second and third character of the middle name, and the mother's maiden name and the father's first name, then we consider that a positive match; and in that case, the Social Security Administration feels that that is the number of the individual, and we will provide that back to the individual.

BY MR. HIRT:

Q. What number are you providing back to the individual?

A. The one that's associated with the record on Alphadent.

Q. Does that mean that you're not issuing them a new number.

A. We are not issuing them a new number.

Q. What about the Numident file; what sort of [19] accessing is done on that file?

A. I mentioned that some applications have alleged Social Security numbers on them. If we do not find—if we cannot verify that number against the Alphadent file, then in the enumeration system itself, we will generate what we call a Numident finder, which will be processed against the Social Security number and bring the information back, and we will match that back to our application. This is—tends to be 24 hours later.

Q. Other than the processes that you've just indicated, do any other agencies or subdivisions of the Social Security Administration utilize—let's start with—the Alphadent file?

A. We provide a service to parent locator systems of child welfare, a service where we're attempting to identify absent parents. Parent locator service provides a document that's very similar to an enumeration application. They provide all of the information that they have on the individual, name and date of birth at least. We stand the possibility of finding a possible number.

Q. By this, you mean a possible Social Security number?

A. A possible Social Security number.

Q. What about the Numident file; are there any agencies that access that?

[20] A. Yes. There are agreements. I think that any agency may access the Numident file. We don't wholesalely accept information and Numident finders on those things.

Selective Service we provide information with from the Numident file concerning men who have just turned 18 and have just gotten Social Security numbers. Immigration and Naturalization Service, within Social Security, other divisions may access the Numident file generally to verify Social Security numbers. It's not unusual for us to provide a service to verify a number.

The D.C. Office of Aging had a situation not too long ago that they requested that—they were doing something special for everyone over 65, and they wanted us to verify ages based upon o.r records. They provided us with Social Security numbers and, I believe, names, and we went against the Numident file matching these and gave them a determination of whether, according to our files, the individual was at least 65 or not. I understood that if we said that they were—that we didn't match our records for one reason or another, then they went back and recontacted these applicants. They were giving out some sort of special cards for services to senior citizens.

We do that sort of thing fairly regularly. The Office of the Inspector General requests us to review specific information. They can ask for information on a specific account number, Social Security number, or they may ask us to look for [21] certain patterns in, for instance, a state.

We provide a service that is controlled. You just don't get into it. It's controlled through another office. I generally don't even know when these are going on.

THE COURT: I couldn't get that.

THE WITNESS: I generally don't know when the searches are being done for special offices. They're going on on a daily basis.

We have anywhere from 8,000 to 8,000,000 queries against the Numident file on a daily basis. Eight million is a high that I can think of.

BY MR. HIRT:

Q. Do any of these files have any relationship to the Internal Revenue Service, these two files?

A. Well, yes. The relationship is—I'm not sure that I ever finished completely going through the enumeration actions themselves.

When a number has been assigned or a new application comes in and we find a number, we will send information concerning that Social Security number to the Internal Revenue Service. The information basically is the account number, the first initial of the individual, and I think it's six characters of the surname.

Q. What is the purpose of transmitting that information to the Internal Revenue Service?

[22] A. Internal Revenue maintains their tax file with this.

Q. Mr. Hanger, what is the earnings file?

A. The earnings file is another file that's in our division but not in my branch. The earnings file—at the time that we provide information to the IRS, we're also providing information from the earnings file, and again, it's basically, the information we provide is the account number, the Social Security number, that is, and the first initial and again I think six letters of the surname, date of birth, month and year, that is, and a record is developed on this earnings file. The earnings file is used to record quarters of earnings.

Q. What is the purpose of that recording?

A. For retirement purposes, for disability purposes.

Q. Mr. Hanger, I want to read to you from one of the statements that's part of the parties' comprehensive statement of undisputed facts and ask you a question.

Paragraph 44 states: "As of October 11, 1983, the computer system had a record of 55,036 persons with the name Roy, 32 with the same Stephen Roy." Then, it goes on and says: "Plaintiffs object to the relevance of this fact.

Putting aside the last sentence, do you know where that information was derived?

A. Yes, I provided it.

Q. Did you consult a particular file in your office?

[23] A. Yes, we used the Alphadent file.

Q. The Alphadent file.

A. Yes, sir.

Q. Are you aware, Mr. Hanger, of situations where individuals approach the Social Security Administration objecting to a particular number that they've been given?

A. Yes, sir.

Q. Can you describe briefly that situation?

A. There are really two—at least two situations that are involved there.

Q. Okay.

A. One would be the situation where we're trying to protect and reestablish new identities on individuals that are

federal witnesses, that sort of thing, where they're establishing new lives for these people.

The other situation is that we do run into situations where we provide a Social Security number to an individual that perhaps because of their religious beliefs is unacceptable to them. The thing that comes to mind is Social Security numbers which have a series of three sixes, which is supposed to be the sign of the beast.

Q. What do you mean by "the sign of the beast," if you can elaborate on that?

A. Well, I'm not positive that I know what that means.

Q. Okay.

[24] A. I think it's supposed to be the anti-Christ.

Q. What does the Social Security Administration do in response to an objection such as that?

A. This is handled in the district office, and if it's determined that this is a legitimate request for a new number—it may not even be 666. It may even be a number that has some negative connotation to the applicant. It could be a date that's particularly painful to them. So, it may not only be a religious situation.

But through the Social Security Administration, they may request a different number, in which case we will assign a new Social Security number. Now, one thing I think I should say, though, that there's no such thing as an inactive Social Security number. We can't cancel a number after it has been issued.

Numbers are issued basically in a sequential fashion. If you've been given a number, that number is associated with you at least in the earnings files and the IRS. If a second number is assigned, the number should be cross-referred, and I believe they are; and the IRS, the Internal Revenue Service, and the earnings file are updated with pertinent information and the new number.

Q. You've mentioned the Alphadent file. Does your office have any plans to change the contours of that file?

A. Yes.

[25] Q. What are those plans?

A. Well, I have to explain it this way: We're currently running with a tape based system, and the Alphadent file is

maintained upon approximately 200 reels of tape, which are passed on a daily basis.

THE COURT: What do you mean by passed on a daily basis?

THE WITNESS: I'm sorry. We read each of the reels all the way through on a daily basis. Tape has a lot of wear to it. It's not very accurate. You can have read errors, that sort of thing.

Anyway, we're processing it in a batch mode. We're not on a real time system at all. Our goal for the next several years is to get in a situation where Alphadent will be on disc, which will be a little bit more secure; and ultimately, we can develop an on-line system.

Now, the intention is to change the file drastically. The basic—it will no longer be a file used for identity purposes. It will be an index file to the Numident; and what we're going to carry on this file is the Soundex, six letters of the first name, the middle initial, six letters of the surname and date of birth; month and year, that is.

Now, it will not be unusual for us to have multiple account numbers shown per index entry in this type. Now, there's a lot of unique names, but there are also a lot of very [26] similar names that are out there. Each entry will point to multiple account numbers.

I mentioned the Linda Smith because we know that we must be able to carry at least 272 names to handle what's in the system today. I don't remember the number of entries that we made provision for. It's something double that maybe or triple that.

BY MR. HIRT:

Q. Now, coming back to the common name situation, how common is the name "Miller," which is Mr. Roy's wife's name?

A. In 1974, the Social Security Administration published a little book that has a list of all the surnames where there are more than 10,000 individuals in the United States. At that time, Miller was ranked fifth or sixth. I believe it was over half a million Millers. I think Johnson or Smith was number one.

Q. Mr. Hanger, from your standpoint in the Social Security Administration, what is your opinion as to the basis for accessing data systems by Social Security number?

A. There's a lot of beauty as far as accessing systems with a unique number or a unique identifier.

THE COURT: Did you say "beauty"?

THE WITNESS: Yes, sir.

THE COURT: Okay.

THE WITNESS: The problem—well, it makes it much [27] easier. The interesting thing about account numbers—or excuse me—numbers are that we can represent them in various ways. Theoretically, if we had infinite storage, we could assign an address to each number and we could go directly to that address; that would speed up processing. That's not the case.

THE COURT: I don't quite understand that.

THE WITNESS: Okay.

THE COURT: The new zip code, I take it is eight or nine digits; right?

THE WITNESS: Right.

THE COURT: It seems to me that that would go to 999,999,999; is that right?

THE WITNESS: I'm not sure; probably so.

THE COURT: Well—

THE WITNESS: Yes, it could. I'm not sure whether there's a gap in possible zip codes is what I mean.

THE COURT: What?

THE WITNESS: I'm not sure if there are gaps of impossible zip codes, but theoretically, what you're saying is correct.

THE COURT: Well, of course, that's more than one address. That is more than one to every person in the United States and with room for considerable expansion; isn't it, 999 million?

[28] THE WITNESS: Sure.

THE COURT: I don't understand why you need infinite storage capacity to put in an additional nine character number, which would give you an address for everybody in the United States.

THE WITNESS: Okay. I'm not quite following you either. It's one thing to talk about a zip code because we are talking about finite value. It's another thing to talk about information on individuals because, while there is a finite number that can be represented with a Social Security number, there is not a finite amount of information that can be represented.

We have situations where we've received 20 and 30 name changes, additional applications, that sort of thing, for numbers or by individuals. It would be nice if we could say that based upon—the point I was getting to with the Social security number was that we could say: The information for a specific account number is always resident at this location; and we could go directly there. If that were true, we wouldn't even have to carry the account number because the location, the address, would be a representation of the account number.

Now, we're getting back to your point. It's beautiful in that there are so many constraints on it and it is consistent throughout federal government and many of these files I've heard about in the last couple of days in state governments.

An account number is a nine-digit number, and there are certain criteria for that number. It's limited today; its limit will be different tomorrow because new numbers are being assigned, and this information is known.

BY MR. HIRT:

Q. Mr. Hanger, you've heard testimony in this case about the use of what is represented to be a unique name, Little Bird of the Snow Roy, rather than a Social Security number.

In terms of your experience with the system, do you know how the computer the system would input Little Bird of the Snow, in terms of identification?

A. No, sir. I don't know how that would go in.

Q. In terms of the Alphadent file that you mentioned, how would that type of name be imputed into the Alphadent system, either as it is now or after this change is made?

A. I'm not sure, and I'll tell you why I have some problems with it. I don't know whether Little Bird of the Snow is a first name or a first and middle name, and I'm not sure how to break it down. We have certain constraints in the

system that today, a first name is a single name; it is not compounded. We allow compound middle names, we allow compound surnames, but first name is a single name.

The Social Security application itself, the application, when keyed in, will provide up to 80 characters for the [30] entire name.

The records themselves that are Alphadent and Numident allow only for a fixed portion of first name, middle name and surname. It allows 15 characters of the first name, 15 characters of the middle name and 2- characters of the surname. If they go beyond that, we'd have—we put in overflow indications saying that there's more information for this. If you want to know specifically what the entire name on the individual is, then you must go back to the documents and get a microcopy of it.

I mentioned the data control number that we use. The data control number can be used clerically to get a copy of this—of the application itself.

Q. In terms of the Alphadent system, which you just mentioned, assuming for the sake of this question that there was a number for Little Bird of the Snow, how would her name appear in the Alphadent file?

A. I'm not positive. I don't know. It—

Q. Would it be subject to differing interpretations by people because of the uniqueness of the configuration of her name?

A. I suspect so.

THE COURT: Now, I didn't grasp the significance of that. Please read it back

(The preceding question and answer were read [31] back by the reporter.)

BY MR. HIRT:

Q. Coming back to the Alphadent file again, how would your system function if in the space that would be allotted for Social Security number the data would be carrying that entry as a blank?

A. Our system wouldn't work.

Q. Can you elaborate as to why it wouldn't work?

A. Yes. Blanks have a certain bit configuration, and numbers have a different basic bit configuration. We're looking for a Social Security number that is numeric.

If we're processing—let's say that we did have a blank entry on Numident, blank Social Security number on Numident—if there ever were any queries to this, unless we made changes to the definition of the file, the program would advent. Now, it's a little more—

THE COURT: What?

THE WITNESS: I'm sorry. Abnormal termination, it would blow up.

BY MR. HIRT:

Q. Not literally blow up, I assume.

A. Well, it might. No, it would not literally blow up. It would come to an abnormal termination.

I suppose that we could carry blank Social Security numbers. What it would mean would be that each and every [32] program in the Social Security Administration which would ever need to access the account number would have to be recompiled, we would have to go through a compiler, take the source code and we'd have to redesign the field as no longer being a numeric field; and many times, we use what we call packed decimal to represent this. A nine-digit field can be carried in five characters. Now, this saves storage. Four bytes of information, big deal, what's the significance of that? The significance is that when we're dealing with over 300 million records, space and storage equate into expense for a hardware, processing time and the potential for error. We want everything as compact as possible.

Now, we have to recompile every program that used the account number. We would probably have to redefine every file that was in the system that had an account number because it no longer would be a packed or binary field or whatever they're using. People can use a number in various ways, and they do. I don't know all the ways they're using account numbers or how they're representing them; but they're representing them as numeric values, I do know that. So, if we went to something that would be non-numeric, then the definition of the file itself would have to be changed.

Now, this gets in[illegible]are we[illegible]have to change record formats, we would have to change access methods to disc files. It's quite an extensive thing. I'm not really sure how [33] we would do it. I don't even know how we could identify all the places to do it. We would have to wholesalely change everything, I believe.

Q. Do you know how that would relate to the ability of Social Security Administration files to be matched with state files, for instance, that we've talked about, like unemployment or wage?

A. I suspect that they would have to do the same sort of thing. We'd have to rethink everything. The one common data element that I see that we're passing between different users is the account number, and the account number today is always a numeric, it's always nine digits long and it's always within certain parameters.

Q. In terms of this possible change in the system, if it had to be done, do you know whether that would require any actual stopping of the system or any of your programs to reformulate this?

A. I believe that—we couldn't operate with two systems. We would have to make the conversion all at once, or we would have to limit service. If we're going to maintain complete service for Little Bird of the Snow and she had a Social Security number which was blanks, we would have to have the whole thing done at once. It seems like there's a conversion time; I have no way of estimating that. It just seems—it's a horrible concept as far as I'm concerned because I don't [34] know how to do it.

THE COURT: I didn't understand what you meant in your answer to the previous question that the nine-digit Social Security number is always within certain parameters. Do you mean that it never begins with a zero or what?

THE WITNESS: Well, it's not all zeroes; that's an invalid number.

THE COURT: Yes.

THE WITNESS: It does not have—Social Security numbers are broken into three parts. The first part is an area indication, it's three digits, and states are assigned specific areas.

THE COURT: I see.

THE WITNESS: Connecticut has 001, 002, 003. The next two digits run from 01 through 99; and 00 again is unacceptable here. The final portion is strictly a serial portion, and it's basically assigned from one through 9,999.

THE COURT: What does the second set of digits signify?

THE WITNESS: Well, it signifies less today than it did in 1937. It shows—it used to indicate when a specific account number was assigned. In 1937 through '72, numbers were assigned in post offices and district offices; federal agencies assigned them. Blocks of numbers were provided to individuals based upon the area and the group, not to individuals but to [35] organizations. Today, we've carried the system over, and we just assign the same general method.

BY MR. HIRT:

Q. The other alternative that's been spoken about it in the testimony was whether, in this situation, Little Bird of the Snow should adopt or share her father's Social Security number.

Do you have any opinion as to the ramifications of that?

A. Yes, I do.

Q. Okay. What is that?

A. Well, I think my opinions are a little different from what's been expressed before. I'm not considered so much—or I don't concern myself so much with the fraudulent issue or situation, but I feel that if two individuals had the same account number, we have a potential of not providing services to one of—one or both of those individuals.

Q. How would that arise?

A. I'm not completely—

Q. Well, what is the potential?

A. Pardon?

Q. What is the potential error?

A. If we're talking about retirement benefits and we have two people using the same account number, then we will have—both of their earnings would be posted the same. Internal Revenue would have trouble collecting taxes. I'm not [36] sure how the welfare agencies use different numbers for different individuals; but it seems to me that there's a potential of a situation there that would have to be resolved before support to the individual could be given.

Q. Finally, Mr. Hanger, were you present in Court on Friday when Judge Muir asked Mr. Roy whether a particularly Social Security number, assuming it was available, would be acceptable to him?

A. Yes, sir.

Q. As a result of that colloquy, did you take any action in terms of contacting your department?

A. Yes. I called my office to see if it was available.

Q. Just for the record, do you know what that number is?

A. If I may, is it 515-94-1002?

THE COURT: That's correct. For what it's worth, so that this record is complete, that number is based on a mnemonic system developed by two individual[s] by the name of Harry Lorraine and Jerry Lucas, and it's in a book called, "The Memory Book," which was very popular some years ago. That's how I arrived at the number.

BY MR. HIRT:

Q. Is it your testimony that that number is, in fact, available?

[37] A. Yes, it is.

Q. How did you derive that information? Would you briefly speak on how you did derive that information?

A. On a daily basis—we run the enumeration system on a daily basis, and we keep track of where the issuance of numbers are for areas and groups, and this particular—I had one of the fellows that works for me check the daily listing, and the number is from Kansas or would be assigned normally to an individual in Kansas.

Q. What is that?

A. Again, based upon the first three digits, the area, and we're approximately 30,000 numbers away from this, we're three groups away.

Q. Assuming for the sake of this question, Mr. Hanger, that Mr. Roy accepted this number for Little Bird of the Snow, how would the Social Security Administration system adjust, if it had to, its operations to give this particular number to this particular individual?

A. We probably would have to—I'm not sure exactly everything that does have to be done because it's a little complicated. We have to insure that we can provide that num-

ber, which I believe that we can. We've provided special numbers before. Then, we would have to take action to insure that we get the number to the Alphadent, the Numident and IRS. There is one potential problem that I see with it is we edit on [39] queries against impossible account numbers, an impossible account number which has—whose area and group has not been issued at this time. We would have to make some sort of modification so that the system could be queried for a number from an area group that had not been issued.

Q. If you did not make that modification, which as I understand it is because this Kansas area hasn't been picked yet—

A. Yes.

Q. —what would be the result if you didn't adjust the system?

A. In the case of a query, it would be an impossible number, and they will not give the information about it.

MR. HIRT: Your Honor, I have no further questions of this witness.

THE COURT: Mr. Ressler, any questions?

MR. RESSLER: No questions, Your Honor.

THE COURT: Counsel for the plaintiff?

CROSS EXAMINATION

BY MR. GILDIN:

Q. Mr. Hanger, let me get one thing clear that I may be mistaken about. Your department within the Social Security Administration is the department which keeps records about [39] whether Social Security numbers have been applied for and assigned; correct?

A. Yes, sir.

Q. That really is all that your department—not meaning to denigrate that department—but those are the essential functions: the assignment of the numbers and recording who does and who does not have a number; correct?

A. There's a little bit more to that. I think that's probably the primary responsibility in the issuance, but that's not all that we do.

Q. But yours isn't the department that keeps earnings data on these individuals; correct?

A. No, but it's our responsibility to see that the data is distributed to them.

Q. And yours is not the system or the department that keeps the retirement benefit and the black lung benefit and the old age and disability benefits that we've been hearing about; isn't that correct?

A. No, sir, you're correct.

Q. So, what your department does in part is receive inquiries about whether a certain individual does or does not have a Social Security number; correct?

A. That's correct.

Q. You can accept those inquiries by name because indeed you have a separate Alphadent system that records that information by name; correct?

A. We don't accept queries except from parent locater services against the Alphadent.

THE COURT: I'm sorry, I don't understand the answer. Say it again.

THE WITNESS: Would you mind repeating your question again; maybe I misunderstood.

BY MR. GILDIN:

Q. If someone said, "I would like to find out whether a person of this name has a Social Security number," your system has the capacity to do that search; isn't that correct, because they would use the Alphadent file?

A. It probably would be done against a microfilm, which is very similar to the Alphadent master.

Q. So, a search to see if a person of a given name has a Social Security number can be accepted into your system; correct?

A. It can be done. We don't have the facilities to accept that today.

Q. I thought you said that you did those searches.

A. We have a parent locater service, an agreement with the parent locater.

Q. They ask you to search by name; correct?

A. Name and date of birth.

Q. Your computer doesn't explode, as you described it, [40] by the fact that you're asking about someone's name.

A. No, sir.

Q. Even if that person whose name was being searched did not have a Social Security number and, therefore, was not on your Alphadent file—

A. That's not uncommon.

Q. —that request would not explode the Alphadent file; would it?

A. No, sir.

Q. So, if there was a request to find out if Little Bird of the Snow Roy, for example, was in your file—

A. Yes.

Q. —you could, in fact, search the Alphadent file for Little Bird of the Snow Roy; correct?

A. In this situation, does Little Bird of the Snow have a number or not?

Q. The question is: Could you search the file to find out whether she did or not?

A. We could search to find out if she was on the file.

Q. If, in fact, there was no Little Bird of the Snow Roy on the file because she had no Social Security number, you would be able to provide that information back to the person making the request; correct?

A. No information?

Q. Right.

[42] A. Yes.

Q. You would do the search and you would find that there was no Social Security number issued for Little Bird of the Snow Roy, that your Alphadent file states that Little Bird of the Snow Roy does not have a Social Security number.

A. That's correct.

Q. Your computer doesn't explode, as you described it—

A. No.

Q. —when it finds out that there, in fact, was a blank or no Social Security number to the person—

A. "Blank" and "no" are different.

Q. I'm sorry. For the person who has no Social Security number, you would just confirm that your records show that none has been issued for this person; correct?

A. We would say that there's no identity as requested.

THE COURT: I do not know the difference between a blank Social Security number and no Social Security number. What is the difference?

THE WITNESS: The understanding of my difference is if we were to carry an individual with no account number, no Social Security number on the file, then we would really record that as a Social Security number that consist of blanks.

THE COURT: Well, what is a blank Social Security number?

[43] THE WITNESS: What is one? It's nine blanks. No Social Security number, there would be none on the file, no entry at all would be there.

BY MR. GILDIN:

Q. Of course, with respect to Little Bird of the Snow Boy, Mr. Hauger, you've been sitting here throughout these proceedings; correct?

A. Yes, sir.

Q. You realize that she does not have a Social Security number; correct?

A. I don't realize that.

Q. Never mind, it's been agreed in this particular case.

A. No, I'm not sure that it's been agreed. It's generally assumed that that's correct.

Q. You realize that she doesn't want a Social Security number; correct?

MR. HIRT: Your Honor, there's no testimony that she does not want a Social Security number, so I object for lack of foundation.

THE COURT: On what basis?

MR. HIRT: Your Honor, for Mr. Gildin to ask a question that assumes that Little Bird of the Snow says that she doesn't want a Social Security number assumes a fact that is certainly not in evidence.

[44] MR. GILDIN: Your Honor, I'll rephrase the question to satisfy Mr. Hirt.

BY MR. GILDIN:

Q. You realize, sir, that the parents of three-year-old Little Bird of the Snow Boy object to providing a Social Security number for her; correct?

MR. HIRT: I have the same objection with respect to Ms. Miller, there being no foundation for that. I will accept the question as to Mr. Roy.

THE COURT: Well, I'll overrule the objection. We have testimony from Mr. Roy, as I recall it, that his wife joined in his objection.

THE WITNESS: Am I supposed to answer?

THE COURT: Yes, sir.

THE WITNESS: I lost track, I'm sorry.

MR. GILDIN: Would you read back the question, please?

(The pending question was read back by the reporter.)

THE WITNESS: I know that Mr. Roy objects.

BY MR. GILDIN:

Q. So, with respect to the functions of your office, they only come into play if, in fact, it's determined that a number has to be assigned; correct?

A. That's true.

[45] Q. Now, you talked about the ability of people to access state files, correct? You speculated about that.

A. That's all I can do.

Q. You can only speculate. You heard several gentlemen testify here that indeed their state files may be accessed without a Social Security number; didn't you?

A. Yes.

Q. You talked about this procedure where, if someone is assigned a Social Security number and objects to it, that there is some procedure which your department can perhaps accommodate a request to change the number; correct?

A. We can accommodate it as far as assigning a second number. We don't make the decision to do that.

Q. Of course, if that's assigned, as you said, that first number never goes away from the record; right?

A. Yes, sir.

Q. And furthermore, you can always cross-reference to that first number; correct?

A. Ideally, we can.

Q. So that, in fact, if that religious objection existed to the first number, even though some one had been assigned a subsequent number, your records and your computers would

still have information on that first number for that individual.

A. The information on the first number would be the identifying information associated with the application.

[46] Q. So, it doesn't go away from the computer; does it?

A. That's correct.

Q. Do you know if anyone ever told Mr. Roy of this procedure?

A. No, I don't.

Q. You never told him of that; did you?

A. No.

Q. You don't know if any local welfare official told him of that; do you?

A. I don't know whether they did or not.

THE COURT: I don't know what procedure you're talking about.

MR. GILDIN: Maybe I can clarify, Your Honor.

BY MR. GILDIN:

Q. Mr. Hauger, on direct examination, you talked about the notion of someone who had been assigned a Social Security number that they found unacceptable because it violated religious beliefs could ask your department for a different number; correct?

A. Yes.

Q. That's the procedure that we've just been talking about.

A. Okay.

Q. Do you work for the United States Department of Health and Human Services?

[47] A. yes, sir, I do.

Q. I've been asking this question to the other gentlemen called by the defense: Are you aware of the fact that in Stevens versus Berger your department—at least the predecessor named to your department, the United States Department of Health, Education and Welfare—was ordered to continue to provide welfare benefits to an individual without a Social Security number?

MR. HIRT: Your Honor, I have the same objection to relevance.

THE COURT: I'll overrule the objection. I think it's very relevant. I'd like to know what they did in that case.

THE WITNESS: No, I really don't know. I'd like to know what their names are or what their numbers are. I'd like to see if they have numbers now.

BY MR. GILDIN:

Q. Did you ever bother to check to see what your department did in the face of an order to provide benefits to someone, welfare benefits to someone—

A. No, sir, I did not.

Q. Did anyone ever ask you to check that?

A. No.

Q. Somewhere in your department that information is available; correct?

[48] A. I'm sure that's true.

MR. GILDIN: Can I have a second, Your Honor, please?

THE COURT: Yes, sir.

BY MR. GILDIN:

Q. Are you aware that Little Bird of the Snow has been receiving food stamps without a Social Security number?

MR. HIRT: Your Honor, I pose the same objection. She's been receiving food stamps in part because the Department of Agriculture and the Department of Public Welfare haven't terminated her yet in part because of this litigation.

THE COURT: Well, I don't understand how that goes to what the basis of the objection is.

MR. HIRT: Well, Your Honor, I think it's a completely irrelevant question as to why or whether he's aware or not aware that this has been done, the predicate for that being that the reason is that it's been in litigation.

THE COURT: Well, it hasn't been in litigation forever. I assume that the food stamps were issued before the litigation started. I'll sustain the objection at this point, and bring out when the food stamps were issued if you can, or we can clear it up by subsequent testimony if necessary.

MR. GILDIN: Let me move directly to what the types of programs his own department administers.

[49] BY MR. GILDIN:

Q. Within the Department of Health and Human Services, medical assistance and cash assistance are provided; correct?

A. That's what I understand.

Q. That's the same Department of Health and Human Services for whom you work.

A. Yes, sir.

Q. It is undisputed, sir, undisputed fact No. 13: "On January 1, 1982, Stephen J. Roy began receiving cash assistance and medical assistance for himself and his two daughters, Renee and Little Bird of the Snow."

It's also stipulated that it was on September 17, 1982, nine months later, that this cash assistance and medical assistance were discontinued.

So, on the undisputed facts of this case, Little Bird of the Snow Roy was receiving benefits from your department for nine months without a Social Security number.

MR. HIRT: Same objection, Your Honor. I don't see the relevance of whether she received benefits for a certain time period or not.

THE COURT: What's your view, counsel?

MR. GILDIN: Your Honor, this gentleman has suggested that the system cannot function unless all recipients—suggested, although obviously it's not his department—but I should say perhaps speculated that there would be some [50] difficulty of doing it without a number. His employer had done it for nine months without a number, and I want to find out if he had heard of any threat to the integrity of the program as a result.

THE COURT: Well, this case was filed August 17, 1983, and that has some bearing on it as I see it. I'll overrule the objection.

MR. GILDIN: Would you read back the question.

(The pending question was read back by the reporter.)

BY MR. GILDIN:

Q. Are you aware, in light of those facts, sir, of any information that the Aid to Families with Dependent Children program was rendered unworkable?

A. As long as she was not in the data bank itself, it was not.

Q. Not rendered unworkable.

A. No.

MR. GILDIN: No further questions, Your Honor.

MR. HIRT: I just have one question.

REDIRECT EXAMINATION

BY MR. HIRT:

Q. Mr. Hanger, on cross examination, you were asked whether you knew if Little Bird of the Snow had a Social [51] Security number; and if I understood your answer, you suggested that you really didn't know.

Could you elaborate as to why you feel uncertain about that proposition?

A. I don't know how we would search against the Alphadent master file for a name like Little Bird of the Snow. I'd have to know a little bit more about it.

Q. What do you mean, you don't know how you would search?

A. I don't know how the name would be formatted, and that's essential for us to find it.

Q. What would be the problem with formatting a name like that?

A. I think I alluded to the situation that we don't allow compound first names, and it would be—I would have to know a little bit more about what we were looking for. I don't know how to go about it.

Q. In terms of the problem of carrying blanks in lieu of Social Security numbers—

MR. GILDIN: Your Honor, I object. I don't know if this is within the scope of the cross examination.

MR. HIRT: Yes, it is, Your Honor.

THE COURT: It's not a question of whether it's within the scope of the cross examination but whether it was raised new by the cross examination.

[52] MR. HIRT: Well, yes. The issue that was raised new, which I want to ask Mr. Hanger about is—the question on cross was whether the problem of carrying the blanks was limited to the particular system he's talked about, and my

question would be the extent to which it would be broader than that system.

THE COURT: Well, I'll overrule the objection.

BY MR. HIRT:

Q. Mr. Hanger, you testified on direct about the problem of blank Social Security numbers, blanks in lieu of Social Security numbers on the space in the formatted system; and Mr. Gildin asked you a question about whether that problem would be limited to your own computer system.

Do you have an opinion as to whether the problem that you identified on direct would be faced in any of the types of computer systems that you're familiar with?

A. All systems which require a Social Security number and carry that information would have a similar problem to what I foresee us having.

MR. HIRT: Thank you, Your Honor.

THE COURT: Any recross?

MR. GILDIN: None, Your Honor.

THE COURT: Okay. We've been in here just an hour and fifteen minutes; it's quarter of ten. We'll take a ten-minute recess. You may step down, sir, and you may be excused.

[53] THE WITNESS: Thank you.

MR. HIRT: Your Honor, may I ask a clarifying question?

THE COURT: Yes, sir.

MR. HIRT: Do the plaintiffs intend to call any other witnesses?

MR. GILDIN: Your Honor, if we do, it would be Mr. Roy for one line of questioning; no other witnesses on rebuttal.

THE COURT: All right.

(Recess taken from 9:45 a.m. until 9:56 a.m.)

THE COURT: How do we seem to be doing on time? It's shortly before ten. What's your view as to whether we're going to finish this today, Mr. Hirt?

MR. HIRT: Your Honor, I have no further witnesses, and I think Mr. Ressler has only one witness, and Mr. Gildin has indicated that he has limited the examination of his client, so I feel we're doing quite well.

THE COURT: All right. How do you feel about it, Mr. Ressler?

MR. RESSLER: Your Honor, I think that Mr. Chamberlin, the state's one witness, will take maybe half an hour on direct.

THE COURT: You think we're running well ahead of schedule; is that right?

[54] MR. RESSLER: Yes, Your Honor.

THE COURT: Is that your view as well?

MR. GILDIN: Your Honor, I think Mr. Ressler will make his vacation.

THE COURT: Now, do you have another witness, sir?

MR. HIRT: No, Your Honor, I don't have another witness.

THE COURT: Do you rest?

MR. HIRT: Yes. I would just note, as a housekeeping matter, that if we can't finish today, I would like to get that same plane as I got before, so ...

THE COURT: All right. You would have to leave by 4:15.

MR. HIRT: Yes, in that range.

THE COURT: All right, that's fine. Now, does the Department of Agriculture have any evidence to present that we've not heard?

MR. HIRT: No, Your Honor.

MS. ALLABEN: No.

THE COURT: Well, I was looking at Miss Allaben again.

MS. ALLABEN: No, Mr. Hirt has presented our case.

THE COURT: Do the state defendants have evidence they wish to present?

MR. RESSLER: Yes, Your Honor. The commonwealth [55] would call Charles Chamberlin.

CHARLES L. CHAMBERLIN,

called as a witness on behalf of the defendants, having first been duly sworn according to law, testified as follows:

EXAMINATION

BY THE COURT:

Q. Your last name, sir?

A. Chamberlin.

Q. C-h-a-m-b-e-r-l-a-i-n?

A. L-I-N, sir.

Q. Oh, just 1-4-n?
A. Yes, sir.
Q. That indicates the need for Sounder.
A. Right.
Q. Your first name, sir?
A. Charles.
Q. Do you use a middle initial?
A. "L."
Q. "L"?
A. Yes.
Q. Where do you live, sir?
A. I live at 2300 West Mountain Avenue, South Williamsport.
Q. What is your occupation, please?
[56] A. I'm the Executive Director of the Lycoming County Board of Assistance.
Q. Was one of your predecessors Herbert Ertel?
A. He was the director when I started to work, yes.
Q. What was his middle initial, "H"?
A. No, I don't think it was "H."
Q. Herbert E.?
A. Herbert E.

THE COURT: For what it's worth, counsel—and I always point out when I've had any connection with anybody in any case or any body—when I started practicing law, I was associated with a lawyer here by the name of John C. Youngman, who still practices and who at that time represented what was called the Department of Public Assistance then.

THE WITNESS: Right.

THE COURT: Mr. Ertel was the head of the office; and at that time, all claims were prosecuted by way of suit complaints. That was before there was an entry of a judgment or a bond; and all of that work was handed to me as the new lawyer in 1938. So, I did a great deal of work for about two years for the Department of Public Assistance.

I mention this because I think it's important that counsel know of any connection or possible connection, bias, prejudice, sympathy, you name it, on the part of the fact finder;

and if anybody wants me to recuse myself in this case, [57] I'll consider it, but I've found the case interesting.

All right. You may go ahead, sir.

DIRECT EXAMINATION

BY MR. RESSLER:

Q. You testified that you're employed by the Department of Public Welfare.

A. The Department of Public Welfare, Lycoming County Board of Assistance—at the Lycoming County Board of Assistance.

Q. How long have you been employed there?

A. Approximately 34-1/2 years.

Q. Your current title is Executive Director.

A. Correct.

Q. Where in the Department of Public Welfare hierarchy do executive directors fit?

A. Well, each county of the 67 counties has an executive director, so I'm one of 67 here in the state.

Q. Who do you report to?

A. I report to an area manager who reports to the Director of Eastern Operations, who reports to the Deputy Secretary.

Q. How many deputy secretaries are there?

A. The one I'm directly responsible to is the Director of Operations, since I'm in operations. There are numerous [58] other deputy secretaries, medical assistance, deputy secretary for—I don't know. I really don't know because the Department of Welfare is such a large agency that—and each program has deputy secretaries.

Q. Well, let me ask you this: Does the Deputy Secretary that you ultimately report to, is there a title for that particular position?

A. Deputy Secretary for Income Maintenance Operations.

Q. Prior to becoming Executive Director, what were your responsibilities?

A. I was a caseworker for nine years, a casework supervisor for another ten years approximately, I was assistant director for four years, and I've been the director for the past twelve years.

Q. Could you describe your present duties?

A. I'm responsible for the administration of the local assistance office, which in turn is responsible for administering the rules and regulations of the various income maintenance programs in the county. I administer this through approximately 36 people. I'm responsible for all of the administrative duties plus the coordination of all the programs, resolution of any conflicts, just expediting the program so that the people of Lycoming County receive public assistance in a humane fashion in accordance with the law.

Q. How do you find out what the law is at a particular [59] time?

A. Well, the laws aren't changed that frequently,but the rules and regulations and the interpretations, due to various court decisions, appeals and so on, do change quite rapidly.

All of those changes are funnelled through me. I see every piece of procedure, every change, every interpretation and every appeal that affects the regulations statewide; that comes through me in advance of the normal issuance to my staff. I do go over every piece of correspondence to see how it will impact on my staff, as I am responsible for implementing these changes.

In addition, we have ongoing meetings on a monthly, bimonthly and quarterly basis, both within our area, within the Eastern Operations and statewide.

Q. When you say "we have meetings," who are you talking about?

A. I'm talking about my peers, the other 67—or 66 executive directors throughout the state.

Q. During the course of your employment with the department, have you had occasion to become familiar with the various programs that your office administers?

A. That's my job: to be familiar with them in an administrative sense and not to the point where I can sit down and actually determine eligibility with the finite points; [60] however, I did that for many years prior to becoming Executive Director.

Q. Are two of the programs that your office administers the Aid to Families with Dependent Children program and the food stamp program?

A. It is, yes.

Q. Are Social Security numbers required as a condition of eligibility for these programs?

A. For those two programs, yes.

Q. Who has to give Social Security numbers to—

A. Pardon me?

Q. Who has to give Social Security numbers to become eligible for these programs?

A. According to the law and the rules and regulations that I'm supposed to administer or that I am trying to administer, all members of the benefit group plus certain relatives of the benefit group must provide Social Security numbers.

Q. So, it's more than just the person who comes to the office that actually applies.

A. Yes. I'm referring now to the minor children must provide a Social Security number; the parents have to for them. In the case where one or both of the parents are not applying for benefits—and this happens quite frequently—but the benefits are for the other members of the family, those adult members who legally responsible under the support law and the [61] public assistance law must also provide a Social Security number even though they're not receiving benefits; they're not even applying for benefits.

Q. What does your office do if someone applies and doesn't have a Social Security number?

A. We help them get one.

Q. How do you do that?

A. We have the SS-5, which is the application for a Social Security number. We sit down in the application interview, help them complete the form, obtain their signature and even mail it for them so that they have no problem in that respect.

Q. I assume that the Social Security number is not received the same day.

A. No.

Q. That it's sent away—

A. It usually takes—I cannot tell you. I do not know how long it takes.

Q. In the interim period between when it's sent away for and when it's received, will the person get assistance?

A. Yes. There are many factors of eligibility that cannot be established at the initial interview. If the people are otherwise eligible and it appears that the information they have given us is correct, we will grant assistance presumptively; that is, pending verification of the data needed.

[62] Q. Then, do you review that grant when you receive the further information?

A. Usually the information needed is not information related to the amount of the grant; it is usually information not subject to change, such as unemployment registration, identification, birth certificates, insurance policies. It is not related to the actual computation of the grant, the money part.

Q. Well, if the information that came back was contrary to what had been provided to you at the initial application, what would your office do?

A. We would consult the client, make very sure that the information received from the third party is correct. The client would have the opportunity to contest it, and we would make a decision as to which was accurate and correct.

Q. Do you know why Social Security numbers are required for each person in the household?

A. Yes. It's for the complete and correct identification of that individual; and the reason it's in the form of a Social Security number is because of the computerization.

Q. Why do you have to have this complete identification of the individual?

A. Well, in Williamsport, it is not a big problem; but in the larger cities, there is considerable fraud where children's birth certificates are transferred back and forth. There's been many articles in the paper about people receiving

[63] duplicate benefits. I don't know this firsthand; it's what I read in the paper and the statistics I read in my office; but it is for positive identification and to reduce and remove the element of fraud.

Q. How does the Social Security number serve as positive identification? What makes it positive identification?

A. Well, it's a unique number.

Q. And by "unique number," what do you mean?

A. Well, supposedly, it's the only number issued for any individual in the entire country.

Q. In the internal workings of your office, do you use this number?

A. In the internal workings within my office, it is not used to that extent or to a great extent. It is used in the inquiries outside of my office.

Within my office, we have a case number, which identifies the file that that person is known in. The use of the number is mainly outside of the office in inquiries to third parties and through the computer.

Q. Why don't you use the case number to make these outside of the office inquiries?

A. The case number means nothing to anybody outside of our office, except in the case of submitting certain invoices, such as medical invoices. Each person gets a medical card, and that medical card has a case number on it and line numbers—

[64] THE COURT: I didn't get the adjective. What kind of numbers?

THE WITNESS: Case number.

THE COURT: No. I thought you said "line numbers" or something.

THE WITNESS: Line numbers, yes. On the back of the medical card are the names of the people in the benefit group, and they, the provider of the services, knows that that line number means something when they submit an invoice. So, when they submit an invoice for a doctor's visit, they must have the complete case number, line number, category. All of these identifiers mean something to us, and they're aware of how to complete the medical invoices; and that's the only instance that I know of that the case number is used outside of our office by other people. It's for our benefit, and that's used by the department in approving the bills.

BY MR. RESSLER:

Q. Is the case number a unique number like the Social Security number?

A. No. That number can change, and it does change very often.

Q. Well, what would cause it to change?

A. A great many reasons. We're talking about over a period of years. A family can start out with a husband and wife and five children; and over the years, those five children [65] grow up, leave the home, get married, apply for assistance at some time or another. We cannot continue to carry them in their parents' case for the rest of their lives.

So, when they leave home and apply for assistance, whether or not they're married, if they're out of the home and applying for assistance on their own, they're issued a new number.

There are other instances where a woman is married to a man, and they have one case number when they're married, they separate, they go their separate ways, they remarry or even if they don't remarry, but they apply individually, then one of those people would be removed from that case and get a case of his own or her own. The same thing would apply if they married somebody else.

There's all kinds of instances where a new number would be issued. In addition, if a person moves to another county, that county would issue a new identifying case number.

Q. Let's say the person moved to a neighboring state; do you know if neighboring states have the same type of case number system?

A. They would not use any of our numbers. I don't know what their system would be. I would imagine that it would vary from state to state.

Q. Prior to testifying here today, did you have occasion to review the case file of the plaintiffs in this case?

[66] A. Yes, I did.

Q. Now, when we say the "case file," what are we referring to?

A. We're referring to a great many documents in two different files. In this particular situation, Stephen Roy has a case record that he is the head of the case in that particular record. Karen Miller has a case record that she is supposedly the head of that case.

Stephen Roy is in Karen Miller's case record; both children are in Karen Miller's case record. Both children are in Stephen Roy's case record, and Karen Miller is in Stephen

Roy's case record. It's a very complicated, mixed up filing system.

Q. Is that usual?

A. No, it is not.

Q. Why are these people's cases different from the norm?

A. Well, I think this goes back a few years. According to our records, Karen Miller and Stephen Roy maintain that they were never married; they are not presently married. In cases where two adults live together but are not legally or married common law, they have a choice of maintaining their own identity and getting separate benefits. This was the case with Mr. Roy and Miss Miller.

We asked them repeatedly what their living [67] arrangements, what their marital relations were, and they maintain that they are separate households. They had filed an appeal some years back to this effect. They lost that appeal as far as the cash assistance—or as far as the food stamp appeal was concerned.

It's a very complex thing, but it's their wish that this is the way it is. The way I understand the living arrangements is: Karen Miller supplies the food for the family or uses the food stamps for the entire family's food needs. Mr. Roy pays most of the—the larger of the cash grant—

THE COURT: You say he receives or he pays? I didn't get what you said.

THE WITNESS: He receives most of the cash grant, and Karen Miller gets the smaller—much smaller amount. I understand she has to pay certain room and board—not room and board but rent, some utilities and shelter costs. It's a—according to our records, it's not only a nonmarital arrangement but it's basically a financial arrangement.

Q. Now, you mentioned that they had filed some appeals. Was an appeal ever filed by either one of them contesting the split of assistance, because you just testified that Mr. Roy receives the large amount and Miss Miller receives the small amount?

A. Yes. Some years ago, we considered Karen Miller as a roomer and boarder, and as such, she was entitled to the [68] grant for a one-person household. Mr. Roy and Renee received a grant for a two-person household.

We determined that—at that time, Karen Miller was receiving general assistance, which is a state category; and our regulations prescribe that—let me see—that the bulk of the money must be in the federal category of assistance. So, we had to consider Mr. Ray and Renee as two people in three-person household, which gave them considerably more than twice what Karen Miller—we had to reduce Karen Miller's grant, and it put most of the financial grant in the ADC case.

Q. Do you remember what the basis of her appeal was?

A. That she was an individual and was entitled to the allowance for one person in a household of three, a full allowance.

Q. Well, everyone is an individual. What do you mean by that she was an individual?

A. Well, she maintained that she and Mr. Ray were not married and that it was a financial arrangement and that she needed the money to pay Mr. Ray for household expenses.

Q. Now, you testified that each of these plaintiffs has a case file.

A. Yes.

Q. Do each of them have a case number?

A. They have each other's number, yes. There is a number assigned to Mr. Ray as the head of the household. That's [69] a 13-digit number. Included in that, as part of that number, is the line number that I referred to earlier. That's the last two digits of the case number is the line number that they happen to fall on. Renee is included in that case number, Little Bird is in that case number, Karen is in that case number with a different last two suffix numbers.

THE COURT: I do not understand the significance of this line number. How does it happen that a 13-digit number had digits 12 and 13 as a line number? What does that mean?

THE WITNESS: That's for the medical invoicing. That's to identify a particular individual to our medical payment center so that payment can be properly made. It could be as high as—I have seen cases where there are 20 or 30 people involved in one case. Maybe only three or four of them are receiving assistance at any one time, but the households change quite frequently and we have large families and fami-

lies living together; and line numbers are extremely important.

BY MR. RESSLER:

Q. Does each person have a line number?

A. Yes.

Q. Is the line number just numerical, based on—

A. It's numerical on the face sheet, what we call a face sheet, which is a document that is—it gives identifying information: name, address, relationship of the people in the case, marital status and also a designator as to what type of [70] assistance they're receiving at a particular point in time.

THE COURT: Is this so-called line number only used for medical purposes?

THE WITNESS: It's used for all invoices. Let me see. It's not used for just line numbers. It's used for transactions within our own department.

THE COURT: All right.

BY MR. RESSLER:

Q. Is Little Bird of the Snow in both cases or just one?

A. All four principals in this case are known in both cases.

THE COURT: I can't hear you, sir. Say it again.

THE WITNESS: All four principals are known in both cases.

BY MR. RESSLER:

Q. So, how many line numbers does Little Bird of the Snow have?

A. I don't recall if she's the same line number in both cases, but she would have two identifying numbers, 13-digit numbers. Now, they just moved last week to Centre County, and they will be given different case numbers, 13-digit case numbers.

Q. What happens to the old numbers?

A. They're discarded unless they come back into [71] Lycoming County, when they will be picked up. They'll be cross-filed for the computer and Centre County's files.

Q. Now, if you made an inquiry to your computer on a case number or a line number—

A. Yes.

Q. I'm not sure I completely understand the distinction, so I'll just use "case number."

A. Fine.

Q. —and you wanted to find out all of Little Bird of the Snow's benefits, could you find that with just one query based on one case number?

A. No. I would have—well, I could find out with using the one case number. However, I would have to access different files because of different computers because the benefits are in a number of different computers.

Q. So, the fact that she has two case numbers, one for Stephen Roy's case and one for Karen Miller's case, that—

A. Oh, I would have to access both numbers, input both numbers in separate inquiries.

Q. I believe you testified that the case numbers can be used internally but not outside the department; is that correct?

A. Except in the areas of invoicing.

Q. Give me some examples of uses outside of the department that you couldn't use a case number for but that the [72] department desires information.

A. I think it's easiest to say that the case number means nothing to any other agency except in the areas of providers of service where the medical card is being used or in the area of banking where the bank is redeeming food stamp coupons or something like that. See, on the food stamp voucher is the—the case number is identified on there. On the check, on the assistance check itself, the Social Security number is imprinted on every check, and this is used as a form of identification by the bank so that they cross-check. If a person does not have the public assistance identification card, they can use—and many times, the banks ask for both identifiers, the ID card issued by our department plus the Social Security card, because the Social Security number is on every check.

Q. Now, why would your office ever really want to use outside sources? What types of things is your office involved in that you have to go outside of your own agency's files?

A. Well, I think that's been answered by the other witnesses. We use it for bank checks, wage checks, unemployment compensation, wage matches, workmen's compensation, state employee files, federal employee files,

servicemen files, Social Security, supplemental security income; all of these things, plus some other things that are being developed.

Q. What types of things are you looking for when you go to these other files?

[73] A. We're looking for verification, many times, of what the client has already told us. We consider the client as the primary source of information. However, many times, he can't provide verification of some of these things.

For instance, a Social Security beneficiary, unless she or he can afford to have that check photocopied or hold that check until she can bring it to our office, can't verify the amount of the benefits she's receiving. The Social Security match verifies it at the next run of that particular computer file.

It does save the client. Some of these matches are not all for fraud and abuse. It does help the client verify what they've already told us.

Q. Why don't you just accept their word?

A. The law doesn't permit that. The law provides that we obtain verification and substantiation.

Q. Do you know why the law requires more, and can you tell us what law?

A. Pardon me?

Q. Can you tell us what law you're referring to when you say "the law"?

A. I'm talking about the various public assistance laws that have been passed over the past 30 years. It's a compilation. Act 75, for one thing, that was passed a few years ago provides a much tighter verification procedure.

[74] Q. Do you know what the purpose behind these tighter verification procedures are?

A. Yes. It's to eliminate fraud so that people are granted assistance—only those people that are eligible are granted assistance.

Q. Now, when did your office start using a computer to match files?

A. Well, the Department of Welfare in Pennsylvania started computerization in 1979. We really didn't get started until 1980-81. We're fairly new at this game, and each year,

additional potential capabilities are added to the system; but we're still in the growing stages of computerization.

Q. Before you started computerization, did your office do the same type of matches but without a computer?

A. Nothing like what we're doing today; and this is what I was saying a little earlier: This is a help to the client. Prior to computerization, if it were a piece of data that affected their cash grant, it might have been necessary to withhold assistance until the information was verified, and the verification process at that time was very—was all manual and it took considerable time.

For example, if we had an indication or suspicion that a person had a bank account, we would have to send inquiries to every bank in the area to check to see if there was an account in the names of any member of the grant, including [75] children. The banks didn't like this, and it took considerable time; but they were obligated by law to respond to our inquiries. Those inquiries were done by last name, first name and middle initial.

The same thing applied to employment. If we suspected a person was employed, we would send inquiries to the various employers that we felt he might be working—if we got a report that a person was working at AVCO, we would send a written report to AVCO to see if he had any earnings there.

It was a very slow, rather unproductive procedure that really bothered the people that we were making the inquiry of.

Q. If you were doing a manual check, what information would you provide to the employer or the bank?

A. We would provide all the information that we had available: last name, first name, middle initial, address, birthdate, Social Security number.

Q. Now, let's say that you didn't have all of that information; would you still go ahead and do the inquiry?

A. We would do the inquiry. If it were a large employer like AVCO, they would probably bounce it back at us and ask for additional information. If we didn't have a Social Security number, for instance, because all of their files for years—any large employer would be on the basis of Social Security number. We didn't have any problem with the

banks; we [76] could get it without the Social Security number.

Q. When you were doing these matches manually, you said they were based on suspicions.

A. First of all, I didn't call them matches; you did. They were not what we consider matches today.

Q. Inquiries.

A. Inquiries. What was the question again, sir.

Q. Were they initiated based on suspicion?

A. Suspicions, clues, lapses in information that just didn't make sense.

THE COURT: I didn't get the last. Wait a minute. I couldn't get the last.

THE WITNESS: Lapses of information that just didn't make the story ring true, it just didn't make sense.

BY MR. RESSLER:

Q. Did you do the inquiries for everybody's case file or just selected people?

A. Depending on how reliable and reasonable the client appeared to be; it was very subjective.

Q. How many of these did you do a month?

A. That would be hard to estimate. I would say upwards of 50 and probably less than 200.

Q. Now, does that mean 50 to 200 cases or 50 to 200 actual letters sent out?

A. Inquiries, letters sent out.

[77]Q. Now that you have started to change to a computerized system, what's your estimate of how many inquiries you do in a month?

A. I couldn't estimate that. First of all, we don't—it's not inquiries at this point, it's matches; and with approximately 12,000 individuals receiving benefits in Lycoming County—13,000, somewhere in that neighborhood—I would say that there are computer comparisons upwards of 30,000 or 40,000 a month.

Now, that doesn't mean that there are that many hits. In other words, we only are notified of what they call hits, where there is information from that particular file about that particular individual; and many times, that's just veri-

fying what the client has already told us, what information we already are aware of.

Q. How do you distinguish between an inquiry and a match?

A. An inquiry is something we initiate in my vocabulary. In other words, we've been told something by a client and we inquire to that source to verify the client's information. A match is a comparison of two computer files.

Q. Now, you said that you initiate inquiries, but you don't initiate matches?

A. We don't initiate the matches, no.

Q. Well, how do they happen?

[78] A. They're done automatically, periodically. Some matches are done on a weekly basis, some monthly, some quarterly. Some matches, such as the state employee matches, are only done once a year as far as I know. Some matches are only done once in four years that we've been involved in computerization. So, those are not initiated by the local office. They're initiated by contract agreements between the department and the computer base, that whoever is operating the computer base, that they want to have a match with, such as the State of New Jersey.

Q. Now that your office uses automatic matches, has that freed up your staff time to do other things?

A. It's freed us up in some areas and tied us up in others. In other words, these reports, these computer printouts do take considerable time.

Q. Well, on the whole, would you say that the impact on your workload has been beneficial or negative?

A. The accuracy of our information has been improved considerably. We could not possibly obtain the information produced by the computer matches in a manual system anymore, not with the staff and the time that we have available.

Q. What do you mean you couldn't do it anymore? Do you mean that you'd have to hire more people?

A. I don't think even hiring people would permit us to obtain the accuracy of the information that we're getting through the computer system.

[79] Q. Now, let's say that your office was doing an inquiry outside the department, say to a bank. In making that inquiry, why wouldn't you just give the bank the Social Security number and the other information for the head of the household? Why do you want to give the bank the information on everyone in the household?

A. Well, if you're going to ask something, you might as well ask the right question or a complete question. It wouldn't do any good—it wouldn't verify anything just to ask for the head of the household because bank accounts can be in anybody's name; and in fact, the schools around here, I believe, are pushing the school children to have savings plans, such as Christmas clubs, savings bonds; they're promoting savings within the schools of very young school children.

Q. Do you know whether there are any people that your office serves who are on assistance whose children actually have, say, Christmas clubs or savings bonds?

A. Yes. We turn those up all the time. Most of the time, it has no effect on eligibility; but occasionally, we find an account that must be disposed of. School children are permitted a larger bank account than the adults. There's an exemption there or a special procedure there for school children.

Q. Now, I just want to go back to something that you just testified to a few minutes ago.

[80] A. Okay.

Q. Now, you testified that if someone came into your office to apply and they didn't have a Social Security number, they would be given interim benefits if they filled out a card and applied; correct?

A. Yes.

Q. Now, before they had the Social Security number, would you be able to run any type of cross-check to verify whether the information they provided you was true or not?

A. I could verify the—yes, we could verify it from most sources. If it were a local source of verification, we could probably verify it. If it were in the federal or in another state, we could not verify it. I don't believe we could.

Q. Do you know if that's the actual practice in the office, or does the office simply wait for the Social Security number to come back in?

A. I'd have to have a specific example. I don't—I don't know.

Q. Well, for example, to verify a bank account, if the person put on the form that they don't have any bank accounts.

Q. At this time, you do not need a Social Security number to verify a bank account. That is coming. I believe that's coming; but at this point, no, not in this area anyway.

[91] Q. What do you mean "it's coming"?

A. I think that the banks we are going to use the Social Security number as an identifier. We're implementing that in the computer system. That's in the short long-range goal to have bank checks through Social Security numbers.

MR. REGELER: I have no further questions.

THE COURT: All right. Mr. Hirt, any questions?

MR. HIRT: Yes, Your Honor. I have two lines of questions.

CROSS EXAMINATION

BY MR. HIRT:

Q. Mr. Chamberlin, you testified about Little Bird of the Snow having a medical assistance card; is that correct?

A. Yes.

Q. Does Little Bird of the Snow get medical assistance at the present time to your knowledge?

A. Yes, she does.

Q. She does?

A. Yes.

Q. Notwithstanding the fact that no Social Security number has been provided for her?

A. A Social Security number is not required for medical assistance, to my knowledge. At least that's our interpretation.

[92] Q. In terms of your discussion of the Roy—

A. May I qualify that? When you say "medical assistance," there are at—well, there are four types of medical assistance, four different categories—well, five really. The cash recipient receives medical benefits and medical services

automatically; that's an all-inclusive medical program. There's another medical program that's all-inclusive for those people not receiving cash benefits but who are categorically needy and qualify for cash benefits but choose not to because of refusal to either a sign a lien against their property or take support action against a spouse or I think there's some other qualifiers; and there's a medical program for blind recipients, blind pension recipients. That is limited in some respects as far as the medical services that we provide.

There's a medical program for medically needy. That covers only doctor bills, dentist bills, inpatient hospital care; that's the type that Little Bird is eligible for and receiving at this time.

There's the medical program for supplemental security income recipients. That has other benefits that they automatically get.

So, when you're talking about medical assistance to a person in the business, you have to be more specific.

Q. Okay.

A. She is receiving medical assistance covering doctor [83] bills, dentist bills and hospitalization.

Q. And this is at the present time?

A. Right.

Q. You also testified in your direct, Mr. Chamberlin, about the Roy households in terms of their having case records.

Are you aware of any situation where Karen Miller complained that Mr. Roy was not providing financial support to her?

MR. GILDIN: Objection to the relevance, Your Honor.

THE COURT: How is it relevant?

MR. HIRT: Your Honor, I think it's very relevant because, throughout this case, Mr. Gildin has been positing questions to the effort that the Roys are an intact family as a single household, living together and, therefore, do not pose any potential problems that are addressed by Social Security numbers, such as households that split up and may apply under separate names; children receiving benefits in a dupli-

rate fashion; situations where there might be a child support issue and Social Security numbers might be linked.

My question would go to whether this family has any history that would suggest that, in fact, they are good candidates for providing Social Security numbers for each individual member of the household as a preventive measure for this coming up in the future. I think what happens in the past is pertinent [94] to what may happen in the future.

THE COURT: I think it has some bearing, so I'll overrule the objection.

THE WITNESS: Could you repeat the question?

MR. HIRT: The court reporter can read it.

(The pending question was read back by the reporter.)

THE WITNESS: In order to answer that, I have to explain that our case records are not verbatim transcriptions of what transpires in an interview. I did see documentation in the record—

MR. GILDIN: Your Honor, I hate to interrupt, but at this point, it becomes quite clear that the basis for the witness' answer is going to have evidentiary problems. He's testifying to what he saw in the records. At that point, we have a hearsay problem and a best evidence problem with respect to that particular thing. This witness has no personal knowledge. They have, again, listed no exhibits to be offered in this trial, and if this witness is going to testify to what he saw in the document and no personal knowledge, that becomes inappropriate at this point, and we would object to that.

THE COURT: What's your response, counsel?

MR. REGGLER: Well, Your Honor, first of all, it's clearly a business record. It's a record that's maintained by the department; it's an official record of the department. [95] Secondly, I would think it's probably an admission by a party. Under both of those particular provisions, it would be admissible; and finally, we're not offering the document in as an exhibit, so I don't see the relevance of whether it's on an exhibit list or not.

THE COURT: Do you want to say anything?

MR. HIRT: Well, I concur with that. I think that a statement by Karen Miller to the effect that there's been no sup-

port is an admission by a party plaintiff, it's quite probative and relevant, and I think that the director in his capacity as the head of the program, who relies upon his caseworkers to take information, is quite authoritative to respond to this.

At most, I think Mr. Gildin's objection goes to the weight of the evidence, but I think it's certainly probative and admissible, as Mr. Rossier has indicated.

THE COURT: I'm going to sustain the objection but not for the reason given. I'm going to sustain it because it calls for a yes or no answer, and he's about to give some lengthy explanation. Read the question back, please.

(The pending question was read back by the reporter.)

MR. HIRT: Well, Your Honor, is the problem that the witness can answer yes or no and then I can follow up with another question? I mean, I don't have any problem with that. If he says he's aware—

[96] THE COURT: Well, I haven't ruled on that yet, so let's get an answer to this question.

MR. HIRT: Okay.

THE WITNESS: Yes.

THE COURT: Okay. Now, go ahead.

BY MR. HIRT:

Q. What, to your knowledge, is the situation that she complained of?

MR. GILDIN: Your Honor, I'd raise the same objection. It's calling for information which this witness has—

THE COURT: All right, I understand. I'm going to sustain the objection but without prejudice to inquire because I find the question indefinite: "What is your knowledge of it?" I don't know whether you're asking him to say how do you know about it or what do you know about it; and I think that if we could get that clarified, we'd be able to tell whether he can testify or not.

BY MR. HIRT:

Q. What is the basis for your knowledge that there has been this allegation of lack of support?

A. Karen Miller filed a support action against Mr. Roy on a number of occasions, and—

THE COURT: Do you want to object?

MR. GILDIN: I move to strike. The question was what the source of his knowledge was, and that's where we get [97] we get into the hearsay problem.

THE COURT: I understand. I'll sustain the objection. He's not answering the question. Read the question back, please.

(The pending question was read back by the reporter.)

THE COURT: You may answer it. What is the basis of your knowledge?

THE WITNESS: Documents in the case record indicating support action.

BY MR. HIRT:

Q. Did you review those documents?

THE COURT: Do you object to that?

MR. HIRT: He's already answered the question, Your Honor.

THE COURT: What?

MR. HIRT: He's answered the question. The objection comes too late.

THE COURT: Well, I'm not sure. He jumped up.

MR. GILDIN: Your Honor, I'm going to move to strike what the document says. The question that's properly asked that goes to the crux of this matter is that he knows because he read some documents. The witness cannot testify to what the documents say until those documents come into evidence.

THE COURT: Did he answer the question, Miss? I [98] didn't hear it. I was watching counsel.

THE COURT REPORTER: Yes.

THE COURT: Well, read the question back to me and what his answer was.

(The preceding question and answer was read back by the reporter.)

THE COURT: All right. I'm going to strike the answer because he's gone beyond the question. Do you want to read the precise question and see if you can answer it precisely, Mr. Chamberlin?

THE COURT REPORTER: Your question, Your Honor?

THE COURT: Yeah, the question that—what's the basis of your knowledge? Now, you may answer that.

THE WITNESS: I'm sorry, Your Honor. I don't know how to answer that question without bringing the case record into play.

THE COURT: Well, I can't figure that out. All you've got to do is say: The documents in the file. What is the basis of your knowledge?

THE WITNESS: Documents in the file.

THE COURT: All right. Now, go ahead.

BY MR. HIRT:

Q. Let me ask you more specifically: What documents are you talking about?

A. I'm talking about support referrals, support orders [89] and vacating of the support order.

Q. What did those documents say?

THE COURT: I'll sustain the objection. Clearly, we should have the documents if he's going to testify as to the contents of them.

MR. GILDIN: Your Honor, I would object to him even providing the documents.

THE COURT: Well, I understand, but we're not at that yet. They may not have them in court. If they've got them in court, we'll see whether they should be allowed to use them, and we'll consider an objection if they haven't been identified.

MR. RESSLER: Your Honor, can we provide some of these files to the witness? He's more familiar with these files than we are, and he might be able to provide the documents easier.

THE COURT: All right. Well, let's wait a minute and find out if you're going to object to the use of those documents.

MR. GILDIN: We object entirely. They've had this file; it's part of their records; they've had it long before this case was even commenced. We had the pre-pre-trial conference to list exhibits; they listed one. We've already had a precedent in this trial when the photograph of Chief Tsosakwa was attempted to be offered. Your Honor noted that it was not on the exhibit list; and here they are at the last [90] minute putting things into evidence that they apparently didn't think were relevant.

THE COURT: Why should you be allowed to use these documents?

MR. HIRT: Your Honor, the reason being that the documents we would use have nothing to do with the defense that's been raised by the federal defendants but go to rebuttal of the plaintiffs' theory that there is no basis to ask for numbers for this entire family because it's an intact family; and I think this is an adequate rebuttal to cast doubt upon that implication.

THE COURT: Well, let's find out what the practice order or the local rule says about it. I think it might be in Paragraph 5.12 of the practice order, which probably refers also to the—yes. It refers to the local rule, and it says Local Rule No. 409.3.

We used to set all of this forth in our practice order, but then when they amended the local rules, they adopted our system so that we've cross-referenced it now.

MR. GILDIN: Your Honor, I believe—and I hate to interrupt—but that in your Local Rule 5.300 concerning schedules of exhibits with respect to the provision of exhibits lists that that would be the governing rule.

THE COURT: Well, I'm looking at the conference between counsel, and it seems to me that that's the first place [91] where we start.

MR. GILDIN: Thank you.

THE COURT: 409.3 says in part: At the conference, all exhibits which any party intends to introduce at trial, whether on its case in chief or in rebuttal, shall be examined, numbered and listed. Only exhibits so listed shall be offered in evidence at the trial except for good cause shown.

Now, what did you want me to look at?

MR. GILDIN: No, it tracks that rule, Your Honor.

THE COURT: All right. Now, if you think you've got good cause for using these exhibits, which have never been listed and the other side hasn't seen them, I'll be glad to hear what it is.

MR. HIRT: Well, Your Honor, my basis would be that I did not think that Mr. Gildin's theory was that he was operating under the assumption that one of the presumptions that should operate in this case is that this family is one in-

tact and shall be intact and that, therefore,there is no basis to collect Social Security numbers. This was the basis for certainly his cross examination of each of the defendant witnesses that I presented; and I don't think that the spirit of the rule, in terms of introducing rebuttal exhibits, covers this situation.

THE COURT: All right. I'm going to sustain the objection. I don't think that's good cause. I think the [92] defense should have foreseen that there would have been a position taken by the plaintiffs that there was no reasonable probability of fraud here; and this evidence goes to show that there is a reasonable probability of fraud, and that should have been anticipated.

MR. HIRT: Can I pursue maybe some other alternatives with the witness just to see—

THE COURT: I can't hear you, sir.

MR. HIRT: I want to pursue a few more questions with the witness along this line that may get around this issue.

THE COURT: Well, you may try, certainly.

MR. HIRT: Thank you.

BY MR. HIRT:

Q. Mr. Chamberlin, other than the case file, do you have any knowledge about allegations by Miss Miller that Mr. Roy did not support her in the past, other than the documents?

THE COURT: Do you object?

MR. GILDIN: If this calls for a yes or no, not yet.

THE COURT: Then, you do object.

MR. GILDIN: Not if it just calls for a yes or no.

MR. HIRT: I'm not asking for a yes or no.

THE COURT: Well, wait a minute. Then, I think it would be better, counsel, if you didn't stand because I'm going to caution the witness not to answer the question if you stand; [93] and we'll try to avoid premature answers that way.

All right. That calls for a yes or no answer, sir.

THE WITNESS: Could I hear the question again?

THE COURT: Yes, sir.

(The pending question was read back by the reporter.)

THE WITNESS: No, I don't think so.

MR. HIRT: Just one moment, Your Honor.

THE COURT: Yes, sir.

MR. HIRT: I'd have no further questions for this witness, Your Honor.

THE COURT: All right. Do you have questions for the witness?

MR. GILDIN: Yes, Your Honor. May we proceed?

THE COURT: Yes, sir, unless you want to take a recess now, and we ought to take another recess about 11:10 because we've had an extremely long morning, and the court reporter at the very least needs a break every hour and fifteen minutes.

MR. GILDIN: Maybe it would be most convenient now, Your Honor, to give the witness and the rest of us a break.

THE COURT: I would like to leave for lunch today some time between 12:00 and 12:15 if we can conveniently arrange it.

(Recess taken from 11:03 a.m. to 11:15 a.m.)

[94] THE COURT: You may proceed.

MR. HIRT: Your Honor, I have a matter that I'd like to raise before the Court.

THE COURT: All right.

MR. HIRT: I think we should approach the bench, and I'd like Mr. Hanger to come with us.

THE COURT: Well, that's a little bit unusual.

MR. HIRT: Let me explain why, and then maybe we can—

THE COURT: When you talk about approaching the bench, that means up here. Is that what you want to do?

MR. HIRT: Right. I'm sorry, Your Honor.

(The following occurred at sidebar:

MR. HIRT: Your Honor, during the recess, based in part upon Mr. Gildin's questions to Mr. Hanger about whether Little Bird of the Snow is, in fact, in the system or whether it was checked, Mr. Hanger, in fact, went back and called his office, and it's information suggesting that Little Bird of the Snow does have a Social Security number, that one was provided for her, which raises certain legal questions in my mind about whether the case not only is moot at the present time but has been moot in terms of even before it was filed.

If you'd like, I can ask Mr. Hanger to describe to you what information he has. I'm not suggesting at this point, Your

Honor, that we would stop at this point since the fact [95] hasn't been established; but this might be a situation where we would want the Social Security Administration to provide what back-up data it has for the Court to take under consideration; and obviously, if Mr. Roy questions that, then we can proceed in that fashion; but I did want to raise this to the Court's attention since it does have, I think, significance for the case.

THE COURT: Well, what are you asking me to do? In order for me to make a ruling, I've either got to have a motion or an objection or something like that.

So, I think the thing to do is for you to make your motion, and I take it that this would be a motion, and I'll find out whether the other side opposes it, and if they do, I'll find out what your reasons are and we'll go from there, and in that way, everybody is protected and everything would be in the normal focus.

MR. HIRT: Well, Your Honor, in order to proceed that way, I would have to recall Mr. Hanger to the stand and have him elicit under oath the information that he's provided. I realize this is out of sequence, and I don't want to interrupt Mr. Gildin's cross of Mr. Chamberlin, but I did want to raise this to the Court's attention at this point.

THE COURT: It's not really interrupting his cross of Mr. Chamberlin because he hasn't even started it, and that doesn't bother me. So, you move apparently to recall Mr.—

[96] MR. HIRT: Hanger.

THE COURT: —Hanger after the close of your case is what it is; isn't it?

MR. HIRT: That's correct, Your Honor.

THE COURT: Well, do you oppose that?

MR. GILDIN: Your Honor, I do oppose calling a witness after the close of a case. If, Your Honor, in fact—

THE COURT: Well, let's find out why we should make this variance then. I don't fully understand it, but you seem to think that the fact that the Social Security Service—the Health and Human Services Department has mooted this case by giving this little girl a Social Security number against the wishes of at least her father. Why should we hear this?

MR. HIRT: Well, Your Honor, we can't say I think at this point in time—although maybe Mr. Hauger knows this information—how the number was procured. I certainly would doubt that the Social Security system unilaterally assigned this individual a number. Someone had to apply for it; and I can't proffer anything to this effect, but I would think that the reasonable presumption would be that one of her two parents applied for the number; and if the number was issued, it had to be either Mr. Roy or Karen Miller.

If Karen Miller asked for the Social Security number and Little Bird of the Snow received the Social Security number, at least the facts as Mr. Roy presented them, in terms [97] of his religious objection, I think that based on his testimony that once the individual has the number, then the case has no further bearing because any further use of the number has no impact on his alleged religious beliefs.

So, if the number was granted several years ago, then I think that Mr. Roy really doesn't have a present objection that he can present in this court.

MR. GILDIN: Your Honor, I don't think—

MR. RESSLER: Your Honor, before he responds, perhaps I should talk at this point. I think that what we can proffer is—would it be the name of Little Bird or the actual number?

MR. HIRT: The actual number.

MR. RESSLER: We can provide the number and the date it was issued. Is that correct?

MR. HIRT: That's right.

MR. RESSLER: Is there any other information that we have?

MR. HIRT: Date of birth.

MR. RESSLER: And the fact that there's a verifier on the date of birth.

MR. GILDIN: I don't see what that has to do with reopening this particular case under these particular circumstances. Mr. Roy has testified that in his view his daughter does not have a Social Security number, he refuses to apply for [98] one, and they had ample opportunity to find out whatever they're trying to find out here, and I would object to reopening the case.

THE COURT: Well, I'm concerned about it. Why wasn't this known at least a week ago if not two years ago?

MR. HIRT: Well, Your Honor, I have to say that this is a situation where we took the plaintiffs at their word that they did not have the Social Security number.

THE COURT: Well, you people run the Social Security number system. You certainly ought to have made an inquiry in my view as to whether or not this little girl had a Social Security number. If she had one and it was assigned properly, let's say on the application of the mother, then we have wasted everybody's time and thousands of dollars of the government and a great deal of time of the plaintiffs' counsel; but on the other hand, the fact that she has a number, if she has it, does not allow me to draw the conclusion that the mother applied for it. It would not be totally to be unexpected that somebody in the Social Security Administration, when they got the information, just arbitrarily assigned her a number.

So, this is something more than what I know at the moment. It seems to me that it would be improper for me to make a deduction that Karen Miller applied for this number; and furthermore, you people could have caused her to come in here and testify, and if you want that done, we'll consider it.

[99] MR. HIRT: Your Honor, first of all, I think that this is an issue that does not go to the timeliness in the point of the case but that this goes to whether we have a live Article Three case or controversy before this Court, and that type of issue, I think, can be raised at any point in the proceedings, even on appeal; and I'm trying to raise it now at the trial level since I am aware of it.

With respect to Karen Miller, we've already noted that she did not testify in this case; and I think that if the Court desires, we could call her as a witness. I'm not too sure at this point in time, if she denied getting the number, we don't have the evidence in front of the Court to show that she did, in fact, get the number if that's the stated fact.

So, I don't have a document that I could impeach her with, assuming that she would say that she didn't get the number.

So, I don't know whether getting Karen Miller on the stand would be helpful.

If she said, "Yes, I did apply for a number," then this case is moot; but I would suggest that it was the duty of the plaintiffs' counsel to inquire of both of their clients as to whether the facts spoke for themselves. Under Rule 11 of the Federal Rules, Your Honor, the plaintiffs have to certify the facts of their complaint; and we have two plaintiffs, and I don't know whether plaintiffs' counsel made any inquiry at all. I think that the shoe is on the other foot.

[100] THE COURT: I certainly do not. I think this is clearly the fault of the Health and Human Services Department or whatever it's called not to have researched this point prior to this time.

I'm going to grant the motion and we'll hear Mr. Hanger's testimony, but whatever the questions are which are propounded to him are certainly subject to objection by plaintiffs' counsel. I'm worried about whether this case has mooted out, and we'll go from there.

Now, it's also possible that we're not going to finish this today, so let's go.

(End of sidebar conference.)

MR. HIRT: Your Honor, in terms of procedure, do you want to continue with Mr. Chamberlin, or do you want me to call Mr.Hanger?

THE COURT: We've reopened the federal defendants' defense in chief.

MR. HIRT: We call Mr. Hanger.

THE COURT: Yes sir.

ROBERT B. HANGER,

recalled as a witness on behalf of the defendants, having been previously duly sworn, testified as follows:

[101] DIRECT EXAMINATION

BY MR. HIRT:

Q. Mr. Hanger, during the break in the proceedings, did you make a telephone call to your office in the Social Security Administration in Baltimore?

A. Yes, I did.

Q. For what purpose?

A. Yesterday afternoon, I talked to the Social Security Administration, my office, and I asked them if they would go ahead and look for an individual with the name something similar to or identical to Little Bird of the Snow. I gave them the birthdate—Little Bird of the Snow Roy, excuse me.

I gave them the birthdate, 12-28, 1960. I asked them if they would research and see if they could find an account number, a Social Security number. I just called back, and there evidently is a Social Security number for an individual whose first name is "Little" and whose middle name is "Bird of the Snow" as a single name, last name "Roy," female. The records that we have show the birthdate to be 12-28-60, as opposed to 12-28. The mother is Karen Ann Miller, the father is Stephen John—yeah, Stephen John Roy; birthplace, Williamsport, Pennsylvania.

The document control number or microfilm reference number on this particular application has a Julian date of 1961, [102] 0-27, January 27th. Basically, that's the information I have at this point.

THE COURT: Well, did you get—oh, I'm sorry.

THE WITNESS: Do you want the number?

THE COURT: Well, I shouldn't have asked. I think counsel ought to ask whatever question he wants to ask.

BY MR. HIRT:

Q. Other than the information that you just provided to the Court, do you have any other information as to the Social Security number of this individual?

A. The number itself.

Q. What is that number, just for the record?

A. The number is—excuse me. Let me start again. The Social Security number is 205-60-5891.

THE COURT: Five-eight-nine—

THE WITNESS: —one.

BY MR. HIRT:

Q. You used the term "document control number."

A. Yes.

Q. What does that mean in terms of screening data?

A. Well, in this case—

MR. GILDIN: Your Honor—

THE COURT: Yes, sir.

MR. GILDIN: —I must object to this witness testifying concerning what this number is for fear that this could be [103] the first use of this number; and therefore, as Your Honor has heard, if it was used, the evil could be done. So, therefore, with respect to what the number is we would object and move to strike any evidence as to what the number is.

If he wants to testify that there was a number, but we're bordering on a very serious matter with respect to the evil that could be done by this number, and we would ask that—

THE WITNESS: It's not the first time it's been used.

THE COURT: Just a minute.

MR. GILDIN: We would ask that any reference to this number and the actual number be stricken because of the consequences.

THE COURT: Because of what?

MR. GILDIN: The potential consequences because this might be "the use" of the number.

MR. HIRT: Well, Your Honor, I think technically his motion to strike comes too late. If Your Honor wanted this portion of the record sealed, if that was a prophylactic measure, I don't have a problem with that, in terms of someone making use of the court file.

MR. GILDIN: The sealing is not enough, Your Honor.

THE COURT: What?

MR. GILDIN: The sealing is not enough. It's that this could constitute "the use" of the number that would deprive [104] Little Bird of the Snow of greater power; and therefore, we would request that no mention be made of the number and that any reference be stricken from the record.

THE COURT: Well, I'm going to deny the motion because I do not have the power to excise something from the record of this court. It occurred here, there wasn't any objection before the number was set forth; and I'm perfectly willing to ask counsel and the witnesses from now on not to refer to it again, but I cannot expunge what's already in.

MR. MILES: We would make that motion, then, Your Honor, that you direct all counsel and all parties present to make no further reference.

THE COURT: Well, we are certainly going to try to accommodate the plaintiff insofar as we can, but I can't do something that I don't think is proper for me to do, as sympathetic as I might otherwise be of his position.

Well, we will direct that counsel and the witnesses in this case not to use whatever number was assigned under the document control number, which was given by the witness.

BY MR. HIRT:

Q. In terms, Mr. Hanger, of the document control number, does that document control number have any role in our determining, in fact, whether this number is the number as to the individual whose father is Stephen Roy, the plaintiff in this action?

[105] A. In 19__ excuse me. Yes, in 1981, applications were stamped with this document control number; and as they were stamped, this was read through a microfilm printer machine, and it would stamp—they set the Julian data and they would reset the serial number to zero each day; and they would run these documents through, and it would stamp a unique number per document, at the same time making a microfile copy of the document; and this number can be used to access that, either the hard copy or the microcopy.

THE COURT: I think I may have noted down an incomplete Julian date. The date was January 27th; is that right?

THE WITNESS: Well, the Julian date on—can I—

THE COURT: Yes, you can give the Julian date.

THE WITNESS: 81-0-27.

THE COURT: 81-0-27. I left the "one" out. Are there a "one" and "nine" ahead of the "eight"?

THE WITNESS: No.

THE COURT: I did have it wrong. It's 81-0-27.

THE WITNESS: Yes.

THE COURT: All right.

BY MR. HIRT:

Q. Mr. Hanger, without referring to the specific number, do you have any basis for saying whether, in fact, that number would have already been used by the Social Security system?

[106] MR. MILES: Objection, Your Honor. Our motion to the Court was not only that any mention of the number not be made but any reference as far as use be stricken as well.

THE COURT: Well, I'm going to deny that motion. If it's an objection, I'll overrule it. I think that if any harm has been done, it's been done, and now we've got to find out what the consequences are.

THE WITNESS: The number has been used to file this document, the hard copy of the document.

BY MR. HIRT:

Q. Are you aware of any other potential uses?

Q. No.

MR. HIRT: Your Honor, I have no further questions.

THE COURT: All right. I'm not sure what you mean by "the number has been used." Are you talking about the Social Security number, or are you talking about the document control number?

THE WITNESS: I'm talking about the document control number.

MR. HIRT: I misunderstood.

THE WITNESS: Maybe I'm answering the wrong question. We're talking about the document control number?

BY MR. HIRT:

Q. I was asking about the Social Security number. Without obviously saying what it is, do you have any knowledge [107] as to whether that number would have been used thus far by the Social Security Administration?

MR. MILES: Objection, Your Honor. He asked the witness whether he has any knowledge whether it would have been used.

MR. HIRT: Has been used. I'll clarify.

THE COURT: Reask it so there's no problem.

BY MR. HIRT:

Q. Do you have any knowledge as to whether the number that we've referred to, which we won't say, has been used by the Social Security Administration?

A. The Social Security number, you're asking about?

Q. That's correct.

A. It has been distributed to the Internal Revenue Service, and entry has been made on the earnings file under that number.

Q. Are you aware of any other uses to which that number has been put?

A. No.

MR. HIRT: I have no further questions of this witness.

MR. GILDIN: Mr. Hanger—

THE COURT: I'm sorry. What about you, Mr. Ressler, do you have questions?

MR. RESSLER: Yes, Your Honor.

[108] CROSS EXAMINATION

BY MR. RESSLER:

Q. Mr. Hanger, you testified that when a Social Security number application is received, it's stamped with a document control number.

A. It was in 1981, yes.

Q. Who prepares applications?

A. Either the individual applying for the number or parent, guardian, that sort of thing, that sort of individual.

Q. Will an application be processed by the Social Security Administration that has not been signed by either the parent or the guardian?

A. If it's a minor child, my understanding is that it would not be.

MR. RESSLER: No further questions.

THE COURT: Now, counsel, Mr. Gildin.

CROSS EXAMINATION

BY MR. GILDIN:

Q. Mr. Hanger, do you know, sir, when the application for this number was made?

A. I'm sorry, I don't know. I know that from this document control number, my guess is that it's a week or two before the 27th of January.

Q. So, that would be very close to the date of birth [109] that's indicated, December 28, 1980; correct?

A. Yes, sir.

Q. So, you don't know whether, in fact, Mr. Roy signed that application; do you?

A. The information that I got was from a Numident printout. It originally came from the Alphadent. Let me go

through this. It came from the Alphadent as far as the identity of the number, and then they evidently got a query as to the Numident for that number.

I mentioned before that we will maintain multiple names of the individual on the Numident file, or I think we said that. We did not maintain signatures if it was other than the individual, so I couldn't tell from the information I have.

Q. So, from your information, you don't know whether Stephen Roy ever signed an application for a Social Security number.

A. No, sir.

Q. You don't know whether Karen Miller ever signed the application for the Social Security number.

A. No, sir, I don't.

Q. You don't know who prepared the application for the Social Security number; do you?

A. No, sir.

MR. GILDIN: We have nothing else for this witness, Your Honor.

[110] THE COURT: All right. Do you have any further questions, counsel?

MR. HIRT: I have no further questions of Mr. Hanger.

THE COURT: Mr. Ressler?

MR. RESSLER: No, Your Honor.

THE COURT: Wait a minute. I've got a couple of questions.

EXAMINATION

BY THE COURT:

Q. I thought you said earlier that you wouldn't know how to search for the name, "Little Bird of the Snow."

A. Yes, sir, I did say that.

Q. Well, it occurred to me at that time: Why couldn't the first name be "Little" and the rest of the name be the second set?

Why would it be so unusual to try to search for it in that manner?

A. Well, this—when they identified the number, either yesterday or early this morning, they did it clerically against a microfilm that is—basically, it's the same file as the

Alphadent, and they used clerical discretion in searching for it.

Q. All right, but if you were going to look for this [111] name, what would be so unusual about looking for a name where the first name is "Little" and because you can't combine first names—

A. That's correct.

Q. —you could combine the whole rest of it into the middle name? What's so unusual about it?

A. There evidently is nothing that unusual about it.

Q. Well, why is it proper for the Social Security branch or the Department of Health and Human Services to be withholding any benefits from this little girl if, in fact, that is being done?

A. Are you asking my opinion, sir?

Q. Yes.

A. I don't believe that it is proper.

Q. Well, have you heard testimony in this case that this little girl—

A. Yes.

Q. —has been deprived of benefits for about a year and a half?

A. Yes, sir.

Q. Well, how do you explain that?

A. I explain it because the Social Security number was not provided, and that evidently is a requirement for these benefits.

Q. Not provided by whom?

[112] A. The parents in this case.

Q. But you already had the number.

A. Yes, sir.

Q. Well, then, why didn't somebody search for it?

A. I can't answer that, sir.

THE COURT: All right. Do you have any questions relating to the Court's questions, Mr. Hirt? Do you have any questions?

MR. HIRT: No, Your Honor, I don't.

THE COURT: Oh, I thought you said you didn't.

MR. HIRT: No, I don't.

THE COURT: Mr. Ressler, do you have any questions?

MR. RESSLER: Your Honor, I was standing to address the question that you had raised but not to the witness, so I don't have any questions for the witness.

THE COURT: Oh, okay. Do you have any questions to the witness relating to the Court's questions, Mr. Gildin?

MR. GILDIN: None, Your Honor.

THE COURT: All right. You may step down. Thank you.

THE COURT: Is this case moot? What's the plaintiffs' view about that?

MR. GILDIN: Your Honor, I don't see anything that moots this case at all. Mr. Roy has testified under oath that, in his view, his daughter does not have a Social Security number [113] and has not been deprived of greater power, and I don't see anything that the defendants have stated to the contrary.

THE COURT: Well, in fact, she has been given a Social Security number; is that correct?

MR. GILDIN: Your Honor, they stated that their records indicate a number without any evidence that Mr. Roy ever applied for that number, without any evidence that Ms. Miller applied for that number, without any evidence that any of them have used that number.

THE COURT: Well, what's troubling me is that, even if they didn't apply for it, somebody obviously put this process in motion and a number was supplied; and the question to me is: Why is this case not moot?

MR. GILDIN: Your Honor, I think you'll hear that at the time that Mr. Roy takes the stand for purposes of rebuttal.

THE COURT: All right. If you are of the view that it's not moot and you want to put some more evidence on, I'm certainly willing to hear it; but I do not have any power to decide any cases which are not an actual controversy; and if this case is moot, I've got to make a decision based upon that.

MR. GILDIN: I would agree, Your Honor. The issue in this case is whether Mr. Roy has a sincere objection to providing a number at this point in time for his daughter, and indeed, he believes that no number exists in his view and has [114] been used, that this is with sincerity and the existence of his belief is not affected one bit.

THE COURT: Well, I'll find out what the defense point of view is as to whether this case is moot.

MR. HIRT: Well, Your Honor, the first threshold point I would have is that if Mr. Gildin is willing to concede that the evidence is such that there is a number and his only legal theory is that as long as Mr. Roy subjectively believes that there's no number and that's sincerely held, I'd submit that that's legally irrelevant because if the number exists, it exists; and under Mr. Roy's own theory of the case, if it's been used, there is no longer spiritual power.

So, Mr. Roy may swear up and down that there's no number in his mind, but if there is a number as far as objective circumstances, then I think there is a real mootness question. Now, if Mr. Roy has a theory that it's simply a continuum of injury, that's a different point; but that's certainly not the point as I understand it.,

THE COURT: Well, I think that we will go forward with the evidence in the case, and we'll hear arguments on it, and I think Mr. Roy ought to have the right to give any further testimony he wishes in the light of this totally unforeseen but completely foreseeable development.

MR. HIRT: Your Honor, I just wanted to add one other point, just for the record, which is that I made one [115] inquiry during this case as to whether there was a Little Bird of the Snow; and the person I talked to left me with the clear impression that there was not. I think the problem is that I was not speaking to the right person.

In retrospect, maybe I should have—I didn't know Mr. Hanger at the time; but I did make an inquiry, and the answer I got was: No, there can't be any such person. So, I did make an inquiry and maybe it wasn't enough, but I went on what the plaintiffs said.

THE COURT: Well, if you made the inquiry and it was the fault of some personnel within the Department of Health and Human Services, if they didn't make the proper search, that's no fault of yours.

MR. HIRT: Well, I'm not casting doubt on anyone. I'm just saying that we did make an inquiry and maybe we just didn't mesh with the right person.

THE COURT: All right. Now, counsel, did you want to say something further?

MR. GILDIN: No, I'm waiting to cross examine Mr. Chamberlin, Your Honor.

THE COURT: All right.

(Charles L. Chamberlin retakes the witness stand.)

[116] CROSS EXAMINATION

BY MR. GILDIN:

Q. Mr. Chamberlin, your jurisdiction includes the County of Lycoming; is that correct?

A. Correct.

Q. The Roy family has been within your jurisdiction for how many years?

A. I think they arrived in Williamsport in 1979—or I'm sorry. I believe it was 1980, just prior to their child's birth.

Q. I'm sorry, I didn't hear the last.

A. Just prior to Little Bird's birth.

Q. I believe that you said, with respect to the risk of fraud, that it's not a big problem in Williamsport; correct?

A. If we're talking about sharing children and receiving assistance for children, not to my knowledge, it has not been a big problem in the past. We do not have the tenements and the high rises that they have in the larger cities.

Q. Despite all of this information you were giving us about the various arrangements between Mr. Roy and Karen Miller, there is no dispute, is there, that Little Bird of the Snow is indeed eligible for cash assistance and medical assistance?

A. I don't know that. The only way that that can be determined is by an application, which is a lengthy procedure.

Q. All right. Are you aware of the fact that your [117] counsel, Mr. Ressler, entered into a statement of undisputed facts in this proceeding?

A. I was not a part of that. I cannot agree with that.

Q. But you wouldn't disagree with anything he put in this statement; would you?

A. I might.

Q. You might?

A. I was not consulted in that.

MR. GILDIN: Your Honor, Stipulation No. 25: "Except for his refusal to provide a Social Security number for Little Bird of the Snow, Mr. Roy has met all the requirements for eligibility for cash assistance and medical assistance for Little Bird of the Snow at all times since January 1, 1982."

Paragraph 33: "Except for their refusal to provide a Social Security number for Little Bird of the Snow, Mr. Roy and Ms. Miller meet all the requirements for eligibility for food stamps for Little Bird of the Snow."

MR. RESSLER: Your Honor—

THE COURT: Yes, sir.

MR. RESSLER:—I would like the record to note that the question that counsel asked the witness did not have the beginning phrase, "except for his refusal"; and I believe, therefore, that the relevance of his reading into the record this particular uncontested fact is not appropriate from the [118] face of it.

The witness stated that he denied that Little Bird of the Snow was eligible, and the stipulation is not to the contrary.

THE COURT: Well, what's your view about that? I don't quite know what you're asking the Court to do. I shouldn't say "I don't quite know." I don't know what you're asking the Court to do, Mr. Ressler.

MR. RESSLER: Your Honor, I suppose I'm objecting on the basis of relevancy to Mr. Gildin reading those statements into the record at this point in his cross.

THE COURT: All right. I'll overrule that because this is clearly an undisputed fact, and I don't see any reason why he can't read it into the record. It's got some relevance, I would think.

BY MR. GILDIN:

Q. Now, Mr. Chamberlin, Little Bird of the Snow has been receiving these benefits without a Social Security number; correct? A Social Security number, I'm sorry, for Little Bird of the Snow Roy.

A. She has been receiving—

MR. RESSLER: Your Honor, I'll reiterate the objection that Mr. Hirt made to questions such as that before, that whether Little Bird of the Snow has been receiving benefits because of this litigation is really not relevant to this case.

[119] THE COURT: Well, I don't even agree that that's correct since I looked at the date of filing this complaint. It seems to me that there were benefits paid or probably paid prior to the date that the complaint was filed. So, I'll overrule the objection.

(The pending question was read back by the reporter.)

THE WITNESS: Little Bird of the Snow has been receiving medical assistance, for which a Social Security number is not required. She has also been a part of the food stamp grant on the basis of an appeal which was filed sometime ago.

BY MR. GILDIN:

Q. She is currently receiving food stamps, even though she has never provided to your office a Social Security number for Little Bird of the Snow Roy; correct?

MR. RESSLER: Objection, Your Honor. I believe that Mr. Gildin has been instructed by the Court as to the proper way to phrase a question.

THE COURT: I haven't instructed anybody to do anything. Are you objecting to the question?

MR. RESSLER: Yes, I am.

THE COURT: On what basis?

MR. RESSLER: I'm objecting on the basis that Mr. Gildin has simply made a statement and then asked the witness to affirm it, rather than ask the witness a question.

[120] THE COURT: Well, that is troublesome to me, but it's probably not illegal. So, I don't think I can forbid counsel doing that. I do point out, though, for the benefit of counsel in other cases that it is much more meaningful to a judge sitting without a jury or, I believe, to a jury to have it framed in the form of a question first; but I don't believe that it's proper for me to deny him the right to do this.

MR. HIRT: Your Honor, I have a different objection, which is that there's no relevance to asking Mr. Chamberlin whether Little Bird of the Snow continues to get food stamps since, obviously, he's just testified that the pendency of this case in an administrative hearing is the basis for that. I know that Your Honor has, I think, overruled my objection in the past on this, but I reiterate it.

THE COURT: But there's been a lot of change in this case in the last half hour.

MR. HIRT: My objection, I don't think, has changed at all by the other issue we just discussed in terms of possible mootness.

THE COURT: All right. Well, I'll overrule the objection to the question. You may answer the question if you can. Now, conceivably, you can't answer that question; I don't know.

BY MR. GILDIN:

Q. Little Bird of the Snow Roy is currently receiving [12] food stamps; isn't that correct?

A. Correct.

Q. Your office has never been provided a Social Security number for Little Bird of the Snow Roy; have they?

A. Correct.

Q. For about a nine-month period of time, Little Bird of the Snow Roy was receiving cash assistance; is that correct?

A. I think so.

Q. She was receiving that even though she did not have a Social Security number; correct?

A. Correct.

Q. No one has ever provided to your office a Social Security number for Little Bird of the Snow Roy; correct?

A. Right.

Q. Indeed, Mr. Roy advised your office that he could not do so because of religious objections to that number; correct?

A. Could not do so because he had never applied for one for her.

Q. He stated that he had religious objections to the Social Security number; correct?

A. Correct.

Q. This is from the year 1980, you stated, to the present; correct?

MR. RESSLER: I don't believe the witness testified [122] to that. I'll object on the basis of foundation?

THE COURT: I'll overrule the objection. You may answer the question, and if you didn't testify that way, you can say so.

THE WITNESS: I think from 1981 was when we first approached it. The child wasn't born until the end of 1980.

BY MR. GILDIN:

Q. So, from the time of her birth, Little Bird of the Snow's birth, to the present, Mr. Roy has at all times refused to provide a Social Security number for her; correct?

A. Correct.

Q. His wife similarly refused to provide a Social Security number for Little Bird of the Snow Roy; correct?

A. I have not heard that testimony.

Q. Well, you have a separate file under the name of Karen Miller, and you said that Little Bird of the Snow Roy is receiving benefits under the file; correct?

A. She's receiving food stamps under that.

Q. For Little Bird of the Snow; correct?

A. Correct, for the whole family.

Q. There's never been, as you just stated, a Social Security number provided for Little Bird of the Snow Roy; isn't that right?

A. Right.

Q. Now, you talked about one of the reasons that the [123] Social Security number is useful is because it helps clients; is that right?

A. I think so.

Q. Of course, denying welfare benefits because Little Bird of the Snow Roy has not had a Social Security number is not using that number to help Little Bird of the Snow Roy; is it?

MR. RESSLER: Your Honor, I'll object on the basis that there's at least three negatives in that question.

THE COURT: What's your view, counsel?

MR. GILDIN: If the witness shares Mr. Ressler's problem, he can tell us.

THE COURT: It's very troublesome to me when he tries to give a "yes" answer. I don't know what it means if there's one negative let alone more than one, so I'll sustain the objection.

BY MR. GILDIN:

Q. Now, you've talked a lot about this notion of whether or not Mr. Roy and Ms. Miller are married. Isn't it true that

that they have told you that they have been married by native custom?

A. No. I found that nowhere in the record, the case record.

Q. You, however, dispute whether Karen Miller is the wife of Stephen Roy; is that right?

[124] A. Not at all.

Q. You don't dispute that?

A. No, sir.

Q. So, you believe, in fact—

A. No, I accept—under common law, I accept the statement of the people involved as to whether or not they are married.

Q. So, you accept the proposition that Stephen Roy and Karen Miller are, in fact, married?

A. I accept it that they're not married.

Q. You accept that they are not married?

A. That's what our case record shows.

MR. GILDIN: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

MR. GILDIN: I'm showing this witness the comprehensive statement of undisputed facts.

BY MR. GILDIN:

Q. Could you read paragraph four of that?

A. Without my glasses? "Karen Miller is the wife of Stephen J. Roy."

Q. Thank you.

Now, you've talked about all of these various use sources that you check to verify information you obtain by the client. One of those was a check on bank records; correct?

[125] A. Would you—the beginning of your question, would you repeat that again?

Q. Mr. Ressler was talking to you about certain outside sources that your department checks—

A. Okay.

Q. —to verify information about clients. Do you recall that?

A. Yes.

Q. One of those sources was a bank check; isn't that right?

A. Right.

Q. I think you stated that there's no problem to get the bank checks without a Social Security number because they can be done by the name; right?

A. That's my understanding, that's the way it still is.

Q. That with respect to children, there is usually no effect on eligibility if, in fact, they had a bank account; isn't that right?

A. There's an exemption under current regulations, which permits children to have special accounts for educational purposes.

Q. Then, another source that you said you check was wages; isn't that right?

A. Yes, sir.

[125] Q. Now, for Little Bird of the Snow, there was no need up to age three to check on any wages that Little Bird of the Snow would be earning; is that right?

A. I think so.

Q. You'd be checking on her parents.

A. Right.

Q. With respect to unemployment compensation, again you would be checking not for Little Bird of the Snow but again for her parents; isn't that correct?

A. Right.

Q. With respect to workmen's compensation, you would not be checking on Little Bird of the Snow but on her parents; correct?

A. Right.

Q. To save time, the same would be true for the state employee files, the federal employee files, servicemen files.

A. Right.

Q. You're now moving to a computerized system of matching; isn't that right?

A. We're deep in the process.

Q. You can still do search requests or match requests without the Social Security number on that system; can't you?

A. On a local basis, basically.

Q. Now, you stated that regulations require every person in the household to have a Social Security number; right?

[127] A. Right.

Q. And it's the law in your view.

A. That's what I'm trained to administer.

Q. Your caseworkers, then, wouldn't have discretion to say: Well, we'll make an exception for an individual case.

A. Correct.

Q. In fact, you wouldn't even have the discretion to make an exception for an individual case.

A. Correct.

Q. The only person in the Pennsylvania Department of Public Welfare who could conceivably grant such an exception would be the Secretary of the Department; right?

A. I'm not sure—I'm not sure if the Secretary would have that discretion.

Q. But if anyone in the department would have that discretion, it would be the Secretary.

MR. RESSLER: Your Honor, I object. I believe the witness has already answered the question; he doesn't need to have it asked again.

MR. GILDIN: His answer to the previous question was that he didn't know whether the discretion exists. My next question was: The person who would have the discretion, if it exists, would be the Secretary.

THE COURT: All right. I'll overrule the objection.

[128] MR. HIRT: Your Honor, I have a different objection.

THE COURT: Well, you should have made it before.

MR. HIRT: Your Honor, in terms of order, one counsel makes an objection and you rule on that; I don't know how I can make the second objection simultaneously unless I say "objection" right after Mr. Ressler.

THE COURT: Well, you don't have to make another objection. There's already an objection. What you're going to do is give an additional reason for it.

MR. HIRT: That's right.

THE COURT: If you'll stand up when Mr. Ressler is making his objection, I will then be glad to hear from you first before I hear from Mr. Gildin; and it fouls it up tremendously if we go back and forth; but we'll do it this time.

Now, what's your objection?

MR. HIRT: My objection is that I think that this calls for a legal conclusion of the witness about who can waive something, and I submit that it's irrelevant to the legal issues in this case.

THE COURT: All right. I'll overrule the objection.

MR. GILDIN: Would you read the question back, please?

(The pending question was read back by the [129] reporter.)

THE COURT: Now, you can answer that if you can. If you think you cannot answer it, that's up to you.

THE WITNESS: I honestly do not know whether she had the authority to make an exception on anything like that.

BY MR. GILDIN:

Q. Mr. Chamberlin, who would you call to find out whether an exception to a regulation could be made?

A. I would call my area manager, who would then research it.

Q. Do you—I'm sorry.

A. Anything like that would have to be done in writing, I think, and it would be a long process.

Q. Now, the programs that you're describing, the Aid to Families with Dependent Children program, the medical assistance program and the food stamp program, the person in charge of the overall administration of these programs on behalf of the Commonwealth of Pennsylvania would be the Secretary of the Department of Public Welfare; correct?

A. Correct.

Q. You made some reference to these case narratives that you reviewed; do you recall that?

A. Case notes is what they are.

Q. Those are notes made by the caseworker following any sort of personal contact with the client?

[130] A. Yes. They're not a mandatory thing. They are supposed to be made—if they're made at all, they're to be made immediately after or during the interview.

Q. They're made by the caseworker?

A. Correct.

Q. The caseworker doesn't hand them over to the client and say, "Is this an accurate description of our conversation?" do they?

A. No.

MR. GILDIN: I have nothing else, Your Honor.

THE COURT: All right. Any further questions, Mr. Hirt?

Now, wait a minute. Let me see who asks first. Any further questions, Mr. Hirt?

MR. HIRT: Yes, one question.

RECROSS EXAMINATION

BY MR. HIRT:

Q. Mr. Chamberlin, I think in terms of Mr. Gildin's examination, you expressed your view that Mr. Roy and Ms. Miller are not married.

Has anyone of them told you that they are, in fact, not married?

A. I have never spoken directly with Mr. Roy nor Miss Miller, so my answer to that is no.

[131] MR. HIRT: No further questions.

THE COURT: All right. Any further questions, Mr. Ressler?

MR. RESSLER: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. RESSLER:

Q. Following up on Mr. Hirt's question, is there any statements that you saw in the file—I mean, here you are already towering over me.

THE COURT: I can't hear you.

BY MR. RESSLER:

Q. Are there any statements in the file that you read where there was a specific statement by Mr. Roy or Ms. Miller with respect to whether they were married?

MR. GILDIN: Objection, Your Honor.

THE COURT: I'll sustain the objection.

MR. RESSLER: No further questions.

THE COURT: All right. Do you have any recross, Mr. Gildin?

MR. GILDIN: No, Your Honor.

THE COURT: You may step down, sir. Thank you.

Do you have any more witnesses, Mr. Ressler?

MR. RESSLER: No, Your Honor.

THE COURT: Do you rest?

[132] MR. RESSLER: Yes.

THE COURT: Now, will you have rebuttal witnesses?

MR. GILDIN: We will have limited rebuttal testimony, Your Honor.

THE COURT: All right. Well, it's after noon now, it's five after. Is this a convenient place to take our recess? Do you think we can take an hour and a half and still get this case finished today?

MR. GILDIN: Your Honor has scheduled our closing for 30 minutes; and I don't recall, were the other counsel going to take 20?

THE COURT: Well, we're going to give each counsel the same.

MR. GILDIN: Thirty minutes, so that leaves an hour and a half for closings and we have very little with Mr. Roy. So, we're talking about two hours perhaps. So, if we're back by one-thirty, hopefully everyone can go home.

THE COURT: Is that acceptable to you, Mr. Hirt?

MR. HIRT: Yes, Your Honor.

THE COURT: Mr. Ressler?

MR. RESSLER: Yes.

THE COURT: All right. We're going to take our noon recess now, and I'll ask you to come back at one-thirty, please.

(Recess taken at 12:05 p.m.)

[133] INDEX TO WITNESSES

For U.S. Defendants:	*Direct*	*Cross*	*Redirect*	*Recross*
Robert B. Hanger				
By Mr. Hirt:	4		50	
By Mr. Giblin:		38		—
Robert B. Hanger (recalled)				
By Mr. Hirt:	101			
By Mr. Reusler:		108		
By Mr. Giblin:		108		
For Pennsylvania Defendant:				
Charles C. Chamberlin				
By Mr. Reusler:	57			
By Mr. Hirt:		81		129
By Mr. Giblin:		116		—

[137] [May 22, 1984]

(Whereupon, 1:30 p.m., reconvene.)

MR. GILDIN: Your Honor, I understand we are in the rebuttal portion of the case now.

THE COURT: Yes, sir.

MR. GILDIN: We would call to the stand Mr. Stephen Roy.

STEPHEN ROY,

recalled as a witness on behalf of the Plaintiffs, having previously been duly sworn according to law, testified as follows:

DIRECT EXAMINATION

BY MR. GILDIN:

Q. Mr. Roy, you have been present for the entire trial, including this morning's session, isn't that right?

A. Yes.

Q. And you heard Mr. Hanger testify this morning that in the records of the Social Security Administration there is an indication of a social security number for Little Bird of the Snow.

A. Yes.

Q. Speak into that microphone.

A. Yes.

Q. Did you ever apply for a social security number for Little Bird of the Snow?

A. No.

[138] Q. Did you ever fill out what's been referred to as the SS-5 form, the application for a social security number for Little Bird of the Snow?

A. No, I have always refused to do that.

Q. Let's talk about your wife, Karen Miller.

Did Karen Miller ever fill out, to your knowledge and understanding, an application for a social security number form—application, I'm sorry, for a social security number?

A. Not knowing, no, not knowing what she was doing.

Q. Did she ever—I'm not talking about signing it, now, I'm talking about filling in whatever blanks exist other than the signatures.

A. Oh, no, no, no.

Q. Is it your—can you tell us whether or not Karen Miller ever signed, in the signature slot, an SS-5 Form?

A. Yes.

Q. Can you explain the circumstances of that signing?

A. Yes. She just—well, she had just come out of labor and they had given her some papers and told her these were to be signed.

Q. What do you mean, "just come out of labor"?

A. She had had a long difficult labor.

Q. And for which child was this?

A. Little Bird of the Snow.

[139] Q. And what happened after she just came out of labor, did you say?

A. It was my understanding that she just come out of labor and they confronted her with these papers and told her these had to be signed. And at that time she was pretty upset because I was to be there present when Little Bird was born, but my daughter was not allowed in, my older daughter Renee, was not allowed in the hospital delivery room and I had to leave her with another girl who was very severely ill; and when I went to go get Renee—I was at the hospital and I had asked them if it was going to be very much longer before she went into labor and they said yes, it would be several hours, without asking her.

And when I went to pick up my daughter at the place where she had been, where she was being watched,and when I came back I found out that Karen was in the delivery room at the time when they told me that it would be several hours before she would give birth and that she had, in fact, been in the delivery room at that time and given birth.

Q. And so do I understand it that she gave birth to Little Bird of the Snow when you were not present in the hospital?

A. Yes. She was very upset about that.

Q. And was it then that she signed the sheet of papers that you described?

[140] A. From what I know, yes.

Q. And I take it one of those papers must have been this SS-5 form.

MR. HIRT: Your Honor, I think he is leading the witness. I think the witness should testify as to his own per-

sonal knowledge as to what papers were there. I don't think there is a foundation for presuming so.

THE COURT: What's your view, counsel?

MR. GILDIN: Your Honor, I will rephrase the question. We're in, obviously, a rather sensitive area in this man's life and I'm trying to make it as easy as possible on him. I won't, hopefully, suspend the Rules of Evidence to do that.

THE COURT: I don't see that. If you can't get the answer you need without suspending them, I'm willing to consider it, but I'm not aware of this as an exception to the evidentiary rules. So I'll sustain the objection.

BY MR. GILDIN:

Q. What is your—do you have a belief as to whether or not Karen Miller was aware of what she was signing?

A. Well, I was there when they sent the social security card in the mail and I opened it up and she said—I asked her if she had signed anything for that, and she told me that she did not recall signing anything.

Q. And what did you do after you received this social [141] security card in the mail?

A. I sent it back with a letter explaining that I had objections to using this number and I was given a reply back from the Social Security Administration that this number would remain dormant until Little Bird of the Snow had decided to use that. And I was made further aware that at some future time that this number might be withdrawn if we did not use it.

Q. And did you ever use that number?

A. No, I refused to.

Q. Did you have a belief as to whether or not that number had, in fact, deprived Little Bird of the Snow of greater power?

A. No, not at that point, if it could have been revoked, no.

Q. Did anyone ever say anything to you that made you believe this?

A. Yes.

THE COURT: I don't understand the question. Read me the question, will you please?

(Question read.)

MR. HIRT: Your Honor, I don't understand the question. I object on the terms of it doesn't have a foundation for what "this" is.

THE COURT: Well, it's not meaningful to me, [142] counsel. Your objection is coming in too late, so I'll overrule it. But I don't understand what is meant by the question.

BY MR. GILDIN:

Q. You testified by means of foundation that you believed that the number would lay dormant and eventually could be withdrawn. Did anyone ever tell you this fact?

A. Yes.

Q. Can you explain the circumstances of that?

A. Well, I talked with them to see what could be done with this number, and they said as long as I had never used it it could probably be withdrawn, but once it had been used and established, it could not be undone; it could not be withdrawn then.

Q. Now, as you testified in Court last Thursday, did you believe that Little Bird of the Snow had been deprived of greater power by virtue of that social security number?

A. Not at the time, no.

Q. And as you testify right now, do you believe that Little Bird of the Snow has been deprived of greater power by use of that social security number?

A. Not if it can be withdrawn.

Q. Would you explain what you mean, "not if it can be withdrawn"?

A. If the number can be—if the records and use [143] that it's been put to can be withdrawn, no.

Q. And how would withdrawing those records insure, in your belief, that the number would not deprive her of greater power?

A. Well, we have the belief that when you photograph the eyes you freeze a part of the spirit in that photograph, and by destroying the negative and the picture itself you free the spirit. That's the only way it could be done.

Q. How does that affect the ability to keep this other number from depriving Little Bird of the Snow of greater power?

A. Excuse me? I didn't understand.

Q. You told us about how by destroying a negative of a photograph you could free the spirit. How does that tie into how withdrawing—

A. Well, if it could be destroyed, then it wouldn't be freezing a part of her spirit. It wouldn't be robbing her of that part of her spirit that it would capture, in that sense.

Q. Now, Judge Muir has—strike that.

Now, assuming, Mr. Roy, that this Court directs that there be no further use of that social security number. Do you believe you could still prepare Little Bird of the Snow for greater power?

A. To some degree, yes. Not as if it had been [144] totally withdrawn. Not as good as that, but yes, to some degree.

Q. I take it if the Court ordered no further use and ordered it to be withdrawn, would you then still be able to prepare Little Bird of the Snow for greater power?

A. Yes.

Q. Now, you have heard Judge Muir suggest, as an option, that a nine digit number be assigned to Little Bird of the Snow based on, in large part, the letters of her name, as I understand it.

THE COURT: On the phonetics of her name.

BY MR. GILDIN:

Q. On the phonetics of her name. Would you have any religious objection to that option?

THE COURT: And I want to state to the witness that he should be completely free to make any observation he wants about that. I'm not suggesting that is what should be done, I merely threw it out as a possibility.

MR. GILDIN: I understand that, Your Honor, and we thought it was most appropriate to have Mr. Roy, on the stand, give his response to that.

THE COURT: All right.

BY MR. GILDIN:

Q. You understand the option the Judge has suggested?

A. Yes. I saw a lot of good in it, but there is the [145] other element of where I have not been able to talk to Karen to discuss that with her. And then again, it would be a number that would apply to her uniquely, and those two elements would still bother me with that. She would—Little

Bird would have to have some say with this number, and the use of this number.

Q. And so—

A. She would have to make some of that decision herself.

Q. And could Little Bird of the Snow presently make that decision?

A. No.

Q. So your answer was what?

A. No, not from what I have seen here.

MR. GILDIN: Your Honor, we have no further questions.

THE COURT: All right. Any cross examination?

MR. HIRT: Yes, Your Honor, if you could give me a second.

THE COURT: Take your time, no hurry.

MR. RESSLER: Your Honor, I have a few questions while Mr. Hirt—

THE COURT: That's fine.

[146] CROSS EXAMINATION

BY MR. RESSLER:

Q. Mr. Roy, had you, prior to today, had you ever told Mr. Gildin or Mr. Miles that you had received a social security card in the mail?

A. Yes.

Q. I want to read into the record paragraph 6 of the contents of the Statement of Undisputed Facts. (Reading) With the exception of Little Bird of the Snow, they all . . . (End of reading)—meaning the rest of the Roy/Miller household—(Reading) . . . all have social security numbers. (End of reading)

You stated a moment ago that with respect to the Court's proffered suggestion with respect to the phonetic number, that you thought there might be some good in it, but that you had to—but you weren't sure, and one reason was that you had not spoken to Karen Miller about this.

A. As it would be a decision concerning Little Bird, she would have to have a say in that, and I have not been able to speak with her about that. I have to give her that say.

Q. Has Karen Miller been out of town for the last three days?

A. Yes.

Q. Where is she?

[147] A. Bellefonte.

Q. Have you spoken to her on the telephone at all?

A. No, because my phone was just hooked up a couple hours ago. She left a message before we went to lunch that I was to call her.

Q. When was the last time you spoke to her?

A. That would be Sunday evening.

Q. This past Sunday?

A. Yes.

Q. Isn't it true, Mr. Roy, that the Court made the suggestion about this proposed alternative before we recessed for the weekend?

A. Yes, but I had told her about that, but we didn't really have any time to really get into discussing it. This kind of thing, it takes time, takes a lot of time to decide something like that, to consider everything that's involved with it.

Q. When you originally testified, I believe you testified that it was permissible for Little Bird to use your number because the damage already had been done, is that correct?

A. Yes, because my number has already been used for me and there is no way I can have it revoked.

I did attempt to have Renee's number revoked when I sent her card in with Little Bird's, and they told me that could not be done.

Q. What response did you get from the Social Security Administration with respect to Renee's card?

A. That it had already been used and that there is no way that they could get—it could retract the use. They couldn't withdraw the card or the uses it had been put to.

Q. Do you, by any chance, happen to have here today the letters from the Social Security Administration that you are re'erring to?

A. No, but I'm sure they exist somewhere.

Q. Do you have copies?

A. I may or may not, I don't know.

Q. Does you—did your counsel ever ask you if you have copies?

A. No. I would like to add that when I first told him, Mr. Miles, I had first had—that she had a social security num-

ber, that this was the first time I had consulted with him about any of this, including the belief.

THE COURT: Including what?

A. Including my belief, and that I don't know, he might not have taken it seriously at first, I don't know.

BY MR. RESSLER;

Q. Do you mean it was the initial consultation, the first time you met?

A. Yes. If you're not used to dealing with the [149] nature of this kind of belief, they are very hard to take serious, if you are given another cultural viewpoint towards looking at this.

We have suffered a lot of ridicule because of this.

MR. RESSLER: I don't think I have any other questions.

THE COURT: Mr. Hirt.

CROSS EXAMINATION

BY MR. HIRT:

Q. Mr. Rey, if I understood your testimony concerning documentation from Social Security Administration, your testimony in response to Mr. Ressler's question was that you did not—that your counsel did not ask you for that documentation, is that correct?

A. Would that be—

Q. The letters, the correspondence between you and what you say Social Security Administration, where you tried to return the card.

A. They may have overlooked that, I don't' know. You have to ask him.

Q. Do you recall volunteering to your attorney that you had such documentation?

A. Not the letter, no, but I had told him that a card had been sent and I had sent it back.

[150] Q. Did you review the complaint in this action before it was filed?

A. Which one?

Q. The judicial complaint that was filed in Federal District Court.

A. Which document would that be?

Q. Maybe if I could—

A. I got sent a lot of documents.

Q. Would looking at the document refresh your recollection as to whether you recall looking at the complaint?

A. Yes.

MR. HIRT: If I may approach the witness?

THE COURT: Surely.

BY MR. HIRT:

Q. Do you want to take a look at this, Mr. Roy?

A. Yes, I think so.

Q. Do you recall discussing the filing of this complaint with either Mr. Miles or Mr. Giblin before it was filed?

A. I think I did discuss it with them generally, and I was furnished with a copy of that, yes.

Q. Okay. Do you recall discussing with them whether, in the complaint, it should be mentioned that you had this prior dealing with the Social Security Administration over [151] getting a card for Little Bird of the Snow?

A. No, I was not asked that, other than my dealings with the welfare office.

Q. So, your testimony is that your attorneys never asked you whether you had a social security number for Little Bird of the Snow, is that what you're saying?

A. Excuse me?

Q. Is it your testimony then that your attorneys never asked you whether you had a social security number for Little Bird of the Snow?

A. No.

Q. But you had informed them about your dealings with the Social Security Administration, your conversation that the number would remain dormant.

A. When I initially consulted Mr. Miles, yes. And to be honest, at the time he was playing with—what was that—a rubic's cube.

THE COURT: I can't hear you.

A. Those cubes with the colors.

THE COURT: Rubic's cube?

A. Yeah, I think that is what they were. He was playing with one of these at the time I was talking to him about that.

BY MR. HIRT:

Q. In terms of while your wife was in the hospital [152] when she was about to give birth to Little Bird of the Snow, were you and your wife on good terms at that point?

A. Yes.

Q. And in your opinion, did you have an amicable relationship?

A. Yes.

Q. And that would be about December 26th, 1980?

A. Yes.

Q. Was your relationship amicable from December 26, 1980 until, let's say, January 26, 1980?

A. Now, what was the date?

Q. A month, the next month, January 26, 1981, excuse me.

A. Well, she was upset with me for not being at the hospital when the child was born, for a little bit, until I was able to explain that to her, because I had to tell her that from what the doctor had told me that she was not in the delivery room at the moment but it would be several hours, and they had told me it would be several hours, and there she was, already in the delivery room.

Q. Well, wasn't it in about February of 1981 that your wife filed a complaint against you for non-support?

MR. GILDIN: Objection, Your Honor.

THE COURT: On what basis?

MR. GILDIN: Nothing to do with the rebuttal [153] testimony that has been offered. Talking about Mr.—

A. Well, I would like to go into that, if I could.

THE COURT: What is your view, counsel?

MR. HIRT: Your Honor, I think this—I think that I could introduce evidence independent, and have the Court take judicial notice, but I think this goes to Mr. Roy's credibility because we're talking about his relationship to his wife. And he is now constructing—I don't want to use that term—he is now telling the Court a story about the circumstances of his daughter's birth and whether or not they procured a social security number.

I asked Mr. Roy whether his relationship with his wife was amicable at that time and point and he said yes. I think

I have the right to ask the witness further questions along this line.

THE COURT: Well, I will have to make an inquiry as to the timing of this. Is the item you're talking about in the same time as these—

MR. HIRT: February of 1981.

THE COURT: All right. I'm going to overrule the objection because I think it does go to credibility.

A. Yes, I think she was required to because she had Little Bird on her grant and I had Renee on my grant; but they did not require me to file a complaint against her.

It was merely because they required it that she [154] filed that. That was their procedure.

BY MR. HIRT:

Q. But she did file a complaint against you for non-support at that point.

A. She had to. That is required.

Q. What is required?

A. Well, it's required that she had to sign that paper and put the claim on me for the support.

Q. Well, were you supporting her?

A. Karen, no; Renee, yes. See, we had the agreement then that one child was to be on my grant and one child was to be on her grant, and that we're married, but we are not—we have eliminated the economically responsible for each other because that caused us a lot of stress in our relationship. Since, it has eliminated a major source of stress.

Could I go further, explain that a little further?

Q. I don't think so. I don't have a question pending.

THE COURT: I think what ought to be done is to wait until your attorney gets a chance to examine you further, which he will have the right to do.

A. Okay.

MR. HIRT: Let me collect my thoughts.

[155] THE COURT: I can't hear you, counsel.

MR. HIRT: I just want to collect my thoughts and see if I have any pending questions.

THE COURT: All right, take your time.

BY MR. HIRT:

Q. Mr. Roy, do you, in fact, know what uses have been made of the social security number which was—which your family procured for Little Bird of the Snow in late 1980?

MR. GILDIN: Objection to the form of the question, Your Honor. There is no evidence that this family procured that number for Little Bird of the Snow.

MR. HIRT: Well, Your Honor, I think that although there is testimony that it was done by, perhaps, Mr. Roy involuntarily, nevertheless it was the family that procured the number. There is no testimony that an outside source applied for the number on their behalf. So,I think it's a proper question.

THE COURT: All right, I'll sustain the objection. I don't think that phrase or factor in the question is necessary and it is certainly despitable at the very least.

BY MR. HIRT:

Q. Now, Mr. Roy, do you have any knowledge as to whether that social security number was used or not used by any governmental agency?

A. Well, from the knowledge that I had until this [156] morning, I was told that it would lay dormant until Little Bird of the Snow chose to use it.

Q. And I think your testimony is that you no longer have that correspondence.

A. I may have it. I would have to look through a lot of my papers. I have got a lot of papers.

Q. You didn't consider it important to bring those documents with you to this case.

A. Nobody had ever discussed that.

Q. Well, I'm asking you, did you consider it important to bring those documents to this case?

A. I didn't know why they would be important. Nobody referred to them.

Q. But I take it from your testimony that you believe that this alleged representation by the Social Security Administration, that the number would lie dormant, is important to you, isn't that right?

A. Yes, sir.

Q. But you don't have accessible the documentation wherein that is stated in writing, is that correct?

A. I don't know. I'm sure if I was to go and contact the Social Security Administration, they might have it in the file somewhere. Other than that, I don't know if I have a copy of that or not anymore.

We just moved over this past weekend and we moved [157] a lot of papers and a lot of things. So, I wouldn't know where it would be at the present time.

MR. HIRT: I have no further questions.

THE COURT: All right. Do you have redirect, Mr. Gildin?

MR. GILDIN: I have nothing, Your Honor.

THE COURT: All right, Sir, you may step down. Thank you.

Excuse me, maybe Mr. Ressler has some further examination.

MR. RESSLER: Nothing further, Your Honor.

THE COURT: All right. You may step down, sir. Thank you.

Do you have any other rebuttal evidence?

MR. GILDIN: Your Honor, at this point we are prepared to go into closing arguments.

THE COURT: Well, I take it you have no further rebuttal.

MR. GILDIN: Yes, I guess that is a definite response.

THE COURT: Any surrebuttal?

MR. HIRT: No, Your Honor.

THE COURT: Very well. Just so that there is no misunderstanding, I am not clear about it—I think I know, but I'm not positive. It seems to me that each of the three [158] counsel are going to be entitled to 30 minutes argument.

* * * * *

[159] MR. GILDIN: Your Honor, first, on behalf of myself, my co-counsel Frank Miles, and the entire Roy family, we would like to thank the Court for expediting the hearing of this case.

A case, Your Honor, which presents the issue of [160] whether the Government may continue to deny welfare benefits to Little Bird of the Snow Roy because her parents re-

fuse to violate their sincerely held religious beliefs by providing a social security number for her. Simply stated, Your Honor, the issue is whether the fundamental rights of free exercise of religion protected and guaranteed by the United States Constitution and federal statutes, including the American Indian Religious Freedom Act, may be eviscerated by the Government's general interest in preventing fraud, duplication of payments and administrative efficiency, even in a case where those interests are not in the least bit threatened by the continued exercise of Plaintiffs' religious beliefs.

The Court is quite familiar with the undisputed facts which give rise to this claim, and given the time limits, I will not repeat them.

The legal framework is simply, Your Honor, the Plaintiffs had the burden of proving, first, that the basis for the objection to this number is religious; second, that that religious belief is sincerely held; and third, that the social security number requirement infringes upon that belief. And under the undisputed evidence, Plaintiffs have plainly met that burden.

Your Honor, the burden then shifts to the Defendants to prove, first, a compelling governmental [161] interest in the social security number requirement; and secondly, the Government must also prove that their interests cannot be served by means less restrictive of the Plaintiffs' religious beliefs, that is, without requiring a social security number for Little Bird of the Snow. We submit that the Defendants have simply failed to meet that burden.

The undisputed evidence amply establishes that Mr. Roy and his wife's objection to a social security number for Little Bird of the Snow is indeed religious in nature.

It is undisputed that Mr. Roy is a Native American of the Abenaki tribe, and that while he wasn't raised in the Abenaki tradition, his parents did teach him certain things about Abenaki culture. And Your Honor may recall the notion of talking to the fish, communicating to the fish through prayer. And around 1972 Mr. Roy began to, what he terms, become aware of his native heritage and the significance of

that, and began to understand his role and his purpose in life.

This was a gradual and evolving religious awareness which continues to this very day. And Mr. Roy pursued his study of native culture, of native religion, of native traditions. It is undisputed that Native Americans like Stephen Roy do not distinguish between religion, tradition and culture. As Mr. Roy testified, his religion tells him how to live. And Professor Drinnon, accepted by [162] this Court as an expert in the traditions and religions of Native Americans, confirmed this and offered writings in support of that opinion.

Indeed, this notion is confirmed by Congress in the Preamble to the American Indian Religious Freedom Act, and further confirmed by this Court's decision in Cole versus Fulcomer, decided on May 15th of 1984, in which, at Page 15 this Court expressly held Native American Indian culture and belief is a religion within the meaning of the First Amendment to the United States Constitution. The Defendants have offered no evidence to the contrary.

Now, Mr. Roy and Miss Miller decided and began to, what they term, prepare their children for greater power, the religious concept of purifying them so that they will be able to be holy persons to obtain certain spiritual powers. And we heard a variety of practices by which the Plaintiffs adhere to the native traditions in preparing their children for greater power.

We see the manner in which Stephen Roy wears his hair; we heard of the burial of the placenta and the naming of Little Bird of the Snow; the Plaintiffs' beliefs in the respect for their children's own decision-making and personality; the fact that they take their children to religious ceremonies and for prayer at holy spots and to sing to the Father; and how Mr. Roy gathers natural foods and [163] herbs for healing and made his pilgrimage to Minnesota for that pipestone, practices which Professor Drinnon testified are consistent with the fundamental traditions of Native Americans.

In sum, Your Honor, the Roy family is doing their best, in this 20th Century technological society, to be faithful to their religious beliefs. And one such religious belief which brings us to this Court is that Mr. Roy and Miss Miller cannot provide a social security number for Little Bird of the

Snow because of certain features of that number: it is unique; it's potential for extensive use; the fact that it's used in computers; the fact that Little Bird of the Snow cannot control that number, and indeed, it may be used to deprive her of her spirit, to rob her of greater power. And indeed, this number displays two of the three elements of the great evil found in the native legend of Katahdin, which Mr. Roy described in some detail.

He believes, and continues to believe, that Little Bird of the Snow has no social security number, notwithstanding the fact that the Government believes it has found such a number. One cannot second guess the fact that Mr. Roy holds this belief.

He fully explained the circumstances of why he believes this number, which the Government finds so significant, has not robbed her of greater power, [164] particularly if, as we shall be asking this Court order the Government to remove any evidence of that number from its records.

A belief, Your Honor, that is plainly founded on Native American tradition, legend and religion. A fear which, ironically, was confirmed by the Government's detailing of the widespread use of this number as an—and I quote—a convenient system of control and identification, to use the words of Mr. Cillo.

As Mr. Roy testified, given the risk which this number carries, it is a decision that only Little Bird of the Snow can make, and in the lives of these people it's a belief that is plainly religious. And despite their desperate need for these welfare benefits, they refuse to be unfaithful to their religion by providing that number to Little Bird of the Snow.

Now, Your Honor—

THE COURT: I would like to hear some extensive presentation of what alternatives you think can be availed in this situation.

MR. GILDIN: Your Honor, I would be happy to address the Defendants' burden in this case with respect to the notion of alternatives, if Your Honor would like me—

THE COURT: Well, maybe you wish to hold this for rebuttal; I don't know. If you think it should come from the [165] Defendants first, I'm willing to follow that format.

MR. GILDIN: I would just as soon present our entire case, because I think that would be as clear as I could put that, and not then save it for any particular rebuttal. But if Your Honor prefers that I address that right now, and leave the religious issues, I will be happy to do so, whatever the Court's preference.

THE COURT: Well, I've heard a substantial amount relating to religion. I have had the opportunity to observe the Plaintiff, and I regret that the wife and the little girl were not in Court, although I understand they were in the courthouse last week. But that's something we can't remedy now.

I'm more concerned at this point, although I have not decided anything, about whether there can be any accommodations to the Plaintiffs' views and accommodate what apparently is some need for uniformity or quasi-uniformity.

MR. GILDIN: Very well, Your Honor, I will proceed to address those issues.

I will clarify that you are quite correct that Karen Miller and their children were here. Unfortunately, they were told by someone outside this very door that they were not supposed to go into the courtroom.

THE COURT: Now, you see, I don't know who gave them that advice, but probably the guard who is now stationed [166] on this floor. And if it had been called to my attention, I would have been delighted to have had them in here. After all, I have had five children and six grandchildren and I am well aware that under certain circumstances a little child might become restless and wish to make some noise and it would be necessary to have her leave the courtroom, we could have done it in a kindly way.

MR. GILDIN: I understand, Your Honor.

THE COURT: I am just sorry that it was not brought to the Court's attention.

MR. GILDIN: We are too and we didn't find out until we had recessed for the day, and then we went out into the outer chambers and found that.

THE COURT: Okay.

MR. GILDIN: Your Honor, the burden of proof rests on the Defendants to prove two things in this case, first, that

the social security number requirement is a compelling governmental interest; and secondly, that the Government's interest in requiring the Plaintiffs to provide a social security number for Little Bird of the Snow may not be satisfied by means which are less restrictive of the Plaintiffs' religious beliefs. That is, that the Government's interest may not be satisfied by allowing the Plaintiffs to continue to refuse to provide a social security number for Little Bird of the Snow. [167] The first thing that the Government must prove is a compelling interest in the social security number requirement.

Now, in this Court's ruling on our motion for summary judgment, or rather, the cross motion for summary judgment, Your Honor agreed with our position, consistent with well settled law, that the Government must prove a compelling interest, not the balancing or weighing test that the Defendants suggest here; that test which has no support and contravenes well settled Supreme Court precedents.

However, in that same motion or order, this Court did reject our contention that the Government's interest must be compelling with respect to the Plaintiffs' in this particular case, and found—and I quote—that as a general matter and without regard to any exceptional cases, the social security number requirement promotes compelling governmental interests.

Your Honor, we continue to respectfully disagree with that proposition, however, it has absolutely no impact on the outcome of this case. And it has no impact because the Government has simply failed to prove the second required element of its case, that is that their interests cannot be served if Little Bird of the Snow does not have a social security number.

And it's this element of the case with which the [168] United States Court of Appeals for the Ninth Circuit, in its opinion, most recent opinion in Callahan versus Woods, found to be "the most critical aspect of our free exercise inquiry". And that's Page 10 of the copy of the opinion filed with this Court.

For, Your Honor, as the Court noted in the Callahan case, to prove this element, no longer can the Government rely on

its generally great interests in maintaining the underlying rule for unexceptional cases, rather, now, the Government must prove the extent to which exempting Little Bird of the Snow from the social security number requirement would somehow impede or impair the purposes of the social security number requirement. And this Court accepted the Callahan analogy in its summary judgment opinion.

The first thing that the Defendants must prove is that the interest served by the social security number, the risk of fraud, the risk of duplication of benefits, the administrative efficiency, cannot be fulfilled if Little Bird of the Snow has no social security number.

And if I may refer again, sir, to Your Honor's opinion on the summary judgment decision at Page 11, "The Defendants' argument that exempting the Plaintiffs from the social security number requirement would eliminate uniformity in the system and impose some burden on the Defendants does [169] not establish that it would be impossible or even difficult to use some identifier for Little Bird of the Snow other than a social security number, without compromising the Government's interests in maintaining a generally efficient and fraud resistent system." Your Honor, the undisputed evidence establishes that the absence of the number for Little Bird of the Snow in no way compromises these interests.

Mr. Hanger, when he took the stand for the second time, testified in response to Your Honor's own question that he can't understand why they couldn't just use Little Bird of the Snow's name. In fact, he just did it by making a phone call and got into those computers, which the Government posits are only accessible with any reliability by the social security number.

It's undisputed that except for providing a social security number, the Plaintiffs meet all the requirements for welfare benefits, so fraud, with respect to these individuals at present is not in issue. And indeed, while there has been no evidence that those people would ever attempt to defraud this Government as a way of procuring welfare benefits, any such risk, any such risk that the Defendants have paraded before this Court, can be prevented without providing a social security number for Little Bird of the Snow.

THE COURT: How?

[170] MR. GILDIN: Your Honor, I will go through each of the problems the Government has posited, and how they are all being taken care of, even presently, with no changes to what is happening right now.

First, we have heard about, that we—the Government has to identify wages to verify the ineligibility.

THE COURT: Well, I can understand that all of the items that are more properly cognizable with respect to adults don't affect a four year old, but suppose we were to enter into an injunction in this case, what's going to happen in 12, 14 years from now, we're going to have a request to modify it because now she has become eligible to earn wages and that type of thing.

MR. GILDIN: Your Honor, it does not seem appropriate to deny relief to these Plaintiffs on the ground that 12 or 14 years from now a circumstance may be different. As Mr. Roy testified, maybe 12 and 14 years from now Little Bird of the Snow Roy will make the decision for herself, which is all we are asking this Court to preserve, her ability to decide for herself whether this number should be provided and used.

THE COURT: Well, you have given me an idea. Maybe we ought to issue an injunction—if we are going to do that—with a cutoff date of 14 years from now.

MR. GILDIN: Your Honor, we would accept most [171] graciously an injunction that would terminate or at least be subject to modification when Little Bird of the Snow turns 16 years of age.

Our point is presently that it is fanciful to deny her benefits for 12 years and presently on the notion that well, maybe 12 years from now the situation might be different. And that is precisely what is wrong with the fact that they have terminated these benefits and threatened to cut these people—cut her off of her food stamps, because each of these purposes is not presently a risk.

As Your Honor knows, with respect to the wages, the concern is with the parents, who have provided the social security number. With respect to identifying unemployment benefits, each of the witnesses agreed, the problem is not Little

Bird of the Snow Roy, but her parents, and we have their social security numbers.

The attempt to find out is she receiving welfare benefits from other programs. The food stamp program would like to find out about the Aid to Families with Dependent Children program and vice versa. But, in each of those programs, Your Honor, the parents are required to and have provided their social security numbers and that may be used as a way to find out what benefits are being received through those programs.

And again, as all witnesses conceded, it is only [172] logical at age three, Little Bird of the Snow is not going to walk into a welfare office and say, give me benefits. And they would never give them to her as a minor, without a number being provided by an adult or a guardian.

We heard about the need to look beyond the Government files into the bank accounts.

THE COURT: Well, I'm not concerned about the bank account, either. Let's take one that might be applicable, namely, medical benefits. How is some doctor going to file a claim for medical services rendered in a situation like this?

MR. GILDIN: Well, Your Honor, anything—and I am not as familiar, obviously, with the welfare programs and requirements as to whether the parent's number is required there, although the general statutory scheme seems to be in all instances the parent's number is required.

This notion of using these computers to reach into the various files and the notion that we need the social security number for those computers is believed by the undisputed evidence that all these computers which seems, in our view, to be the real issue in this case, can be done without using a social security number for Little Bird of the Snow.

Even if we could hypothesize some situation where the parents would not be required to provide their social security numbers, we come down to the issue of the name. And [173] again, one has to search very far to find out or conceive of any situation where you would not be able to identify necessary information through the parents' numbers, for a child under the age of 16.

And again, the notion, as Your Honor points out about bank accounts, workfare programs that they have paraded before the Court, the notion of absent children or missing parents all are very nice as general matters, and we don't contest the use of the number as a general matter, but when one looks as to what the Government proved with respect to its interest jeopardized in this case, one comes up virtually empty with any problems, unless the problem is these computers that they apparently are concerned with.

And while the Defendants suggest that these computers don't work without the social security number, that that number is vital to these computers, in essence, all of those witnesses have verified that matches—their term of art—can be done by name without the social security number.

With respect to the computers used by the Department of Health and Human Services and the Pennsylvania Department of Public Welfare, the description of the computers that they use or conceive of, all work quite successfully even without the social security number.

Now, if I may be permitted to deal with [174] Plaintiffs' Exhibit 20, this F-A-M-I-S system, the FAMIS system which Mr. Stauffer described in his direct examination and he stated that he relied on this manual, Plaintiffs' Exhibit 20—that's, indeed, how we discovered that information. And when confronted with the fact that this document indicates that the computer can do all its matching without the social security number, suddenly Mr. Stauffer began to disavow this document, that well, it was done before the Social Security Act was amended to provide increased federal funding to encourage states to use the computers, where the introduction to that plainly states that it was a product of the amendment of that Act, where this system was generated.

And he suggested that the real system wasn't in this FAMIS manual, but as far as it being applied in Pennsylvania, it was in the red notebook which they call the automated guide. And when we confronted him with that line in the automated guide, he said, well, of course we're going to gauge the efficacy of this system by the standards in the F-A-M-I-S guide.

Now, Your Honor, the standard system described in the FAMIS manual, if I may refer to it as such, this proposed national system for computers which, while not mandatory upon the states, they hope the states will follow, plainly indicates, upon careful reading, that all the functions can [175] be done without the social security number.

First, with respect to searching welfare files within the state, what Mr. Stauffer and his manual refer to as the intrajurisdictional verification, everyone agrees it can be done without the social security number. Yes, the number affects the weight or the credibility of the search, but Your Honor may recall the list of weights in that manual, and in fact, the name of the person and other factors had far greater weights than the social security number. And on redirect examination Mr. Stauffer testified, you know, if you put a person in there with no social security number, it doesn't even subtract points for the fact that you couldn't match it.

And even though Mr. Stauffer attempted to disavow the fact that this system applies in Pennsylvania, the Pennsylvania computer, he agreed, it does the intrajurisdictional search without the social security number; and Mr. Chamberlin confirmed that in his testimony here today.

The absence of that number will not prevent this computer system from determining eligibility, calculating the grant, and authorizing or issuing the payment.

Your Honor may recall the Type 1, 2 and 3 errors that we talked about and are revealed in the manual. And while the Type 1 error will abort the system and nothing goes [176] forward, the Type 3 error allows the computer to go ahead and determine eligibility and calculate the grant and issue the check; and the absence of a social security number is a Type 3 error.

And then the question is, well, can we get into the federal files now without the social security number? Well, Mr. Stauffer ultimately conceded that indeed you could get into those federal files. Mr. Hauger told us here today that you could get into the federal files with just a name. Mr. Conrad, on behalf of the United States Department of Agriculture,

conceded that you could get into the federal computer bank without a social security number. The FAMIS manual suggests that one reason they pick cases to go into the federal verification system is that they don't have evidence of a social security number and thus, the computer rolls onward.

And then it wants to check not only the federal files and not only the same welfare files, but perhaps some of these other other files that the state may have: vital statistics, motor vehicles and the like. And it's quite plain that the system can access these other files without the social security number by using name, birth date, address and the like.

Indeed, Your Honor, the only effect of the absence of a social security number under this system is that at some [177] point in its road through the computer, the search goes into what is known as the social security number verification module. And all that does is make sure that the caseworker gets a note that says, by the way, Little Bird of the Snow Roy doesn't have a social security number and then it goes back and does all the matches that it would do under those circumstances.

So, the absence of a name does not stop the search—I'm sorry, Your Honor—the absence of a social security number has no effect on the ability to use these computers.

We have heard about the weight or reliability of the match, but we have seen the evidence of that.

Mr. hanger, who appeared today—and Your Honor, all he does, in his knowledge—and I don't mean to denegrate it—his department is the department which issues social security numbers, agrees that you can search by name. Again, he just did it for this Court. And as he said again, he doesn't understand any reason why a social security number would be required for Little Bird of the Snow.

Now, with respect to the food stamp program, we heard from Mr. Conrad, who conceded that the social security number is not required to access the file. The only national file that the food stamp program, that is, the United States Department of Agriculture maintains is this file on disqualified persons which uses names and birth dates and he [178] said maybe even addresses in addition to the social security number. And the part of the system used by the

states uses the name and the birth date in addition to the social security number. And Mr. Conrad hopes some day to incorporate the FAMIS system, and he concedes that you can do the wage matching and access the federal files without the number.

So in essence, Your Honor, Defendants concede that the name and the birth date allow them to do these searches without the number, but treated as unreliable because of possible duplication.

Now, they concede that the social security number itself is not perfect, people have more than one, there are transpositional errors. The Department of Agriculture has a current error rate or a projected error rate of seven percent with respect to the food stamp program, even though they are using the social security number. And the Health and Human Services is hoping that the states can meet a goal of four percent with the social security number, but they still complain about names as generally, generally, not unique; that you might have some problems because you have Johnsons and Smiths, as Mr. Hanger testified, but what about Little Bird of the Snow Roy; because that is the question in this case.

There has been no evidence that the name, the [179] sacred name, Little Bird of the Snow Roy, is anything but unique. I asked each one of these defense witnesses, who have the burden of proving the difficulty in the system: are you aware of more than one—

THE COURT: You have five minutes to go.

MR. GILDIN: —Little Bird of the Snow Roy in any file, and they said no, and some of them didn't even bother to check.

And in sum, Your Honor, there is no evidence that the interests cannot be served for Little Bird of the Snow without the social security number. Indeed, to the contrary. The evidence demonstrates that the purpose of these programs: to provide these benefits to needy people like the Roy family, to allow them to have the necessities of life and their appropriate medical care and to be able to feed their families would be defeated if they were denied those benefits without the number.

In the summary judgment opinion the Court also observed that the Government had not yet presented—and I quote again from Page 11—"any evidence regarding the costs which might be incurred by the Government if exceptions are made to the social security number requirement."

Again, the same inquiry was made by the Court in the Callahan case most recently. What are the costs if we exempt one person from the social security number [180] requirement? Your Honor, there is no evidence here of any costs of exempting Little Bird of the Snow. We have some notions that it would continue to appear as an error on our records, but that was purely an administrative error that didn't affect the amount of dollars here. And it's a rather circular argument to say that well, since the number is required, anytime it's not provided our quality control people see it as an error.

Well, the evidence shows that there is no cost to these welfare systems. She's receiving food stamps now without a social security number. Mr. Cornad testified that he doesn't know of any threats to the food stamp system or impact as a result. She received cash and medical assistance for nine months without a number and no one established any evidence of an adverse impact on the system.

Under identical facts, Judge Weinstein, in the Stevens case enjoined the the Department of Health and Human Services through its predecessor entity, not to deny benefits to the Stevens' children because they wouldn't provide a social security number. And Judge Weinstein posited that the effect of exempting these people is going to be miniscule.

I asked each of the federal witnesses: What did you do in the Stevens case; What did it cost; What was the effect on the system? No one knew; no one checked, but most importantly, no one had any notion that there was any adverse [181] effect under those circumstances.

Your Honor, the facts of this case are strikingly similar to those in Schubert versus Burner, decided by the United States Supreme Court, where a Seventh Day Adventist refused to work on Saturday because it was contrary to her religious beliefs as the Sabbath Day. She was denied unemployment compensation. The Supreme Court held that

denial unconstitutional, rejecting the notion of risk of fraud would justify a general regulation, and in justifying the infringement of First Amendment rights, unless there was some evidence that the statutory scheme would be rendered unworkable by that exemption. And there is no such evidence here.

I have asked that of each of these witnesses, was your scheme rendered unworkable? They all said, we're not aware of any. And while they made protests and an avalanche of claims, as Your Honor noted in the summary judgment motion, it's undisputed that out of the millions of recipients of these benefits, there have only been four, four reported cases of any religious objection to this number.

As the Defendants have entirely failed to meet their burden of proof, Your Honor, it's appropriate to award damages to these Plaintiffs, the amount of benefits withheld is undisputed. The law, as set forth in our supplemental trial brief notes that other damages are authorized. Damages [182] for the fact that these Plaintiffs could not feed their family. They had to go to private charities and were turned away. They couldn't go to the holy spots. They were treated and continue to be treated callously and insensitively by Government officials. And, Your Honor, they are also entitled for great damages for the fact of the violation of the right itself.

They also seek a permanent injunction, or will be happy to accept a time limited injunction, stopping these people from denying welfare benefits to Little Bird of the Snow prior to the time she turns 16, based upon the refusal to provide the social security number.

We also ask, in light of recent attempts to denegrate these beliefs, for injunction ordering these Defendants not to use that number which was—which is in their files, and in fact, to withdraw that number from their files so that, in fact, that number may not be used to prevent Little Bird of the Snow from attaining greater power. And, Your Honor, the preliminary injunction motion was consolidated with this hearing, and if there is any anticipation of delay in the issuance of a decision, we would continue to pray for preliminary relief.

THE COURT: Well, what if we get out a decision in about five weeks, which is about the fastest that I can assure doing it. Is that going to cause you any substantial [183] trouble, assuming that we're going—I'll put it this way—assuming that we were going to grant a permanent injunction, and I don't know whether we are going to do it or not—would an injunction coming out five weeks from now cause substantial difficulty?

MR. GILDIN: May I have a moment—

THE COURT: Yes.

MR. GILDIN: —because it's ethically a decision only Mr. Roy can make.

Your Honor, he reports he has gone two years, they can go five weeks.

THE COURT: All right. Well, I can't even guarantee it at that time, but I will do the best I can to get out a decision.

MR. GILDIN: We would simply ask that Your Honor remain sensitive to the proposition that that motion has been filed and is pending.

THE COURT: I understand.

MR. GILDIN: The Government's essential premise—

THE COURT: By the way, your time has expired now. The Law Clerk handed me a note that he didn't think that counsel, when they gave me the estimate of 30 minutes, were allowing for the fact that I would ask questions and expect answers. And I was considering that in the time. So, I—

MR. GILDIN: One more minute.

[184] THE COURT: —think we ought to give each side another five minutes to compensate for the Court's questions.

MR. GILDIN: Okay.

Your Honor, with respect to the issue of damages, Defendant Cohen has raised as a defense the notion of the Eleventh Amendment immunity. And I note from the summary judgment motion that Your Honor dismissed the case against Defendant Cohen with respect to the issue of the retroactive award of benefits.

With all due respect, Your Honor, perhaps it's important to note that we brought this action against Mr. Cohen, both

in his official capacity and in his individual capacity, the latter being the money to be paid by Mr. Cohen personally.

The Supreme Court, in Shire versus Rhoads, noted that the Eleventh Amendment immunity is not available to a state official sued in his individual capacity. Mr. Ressler evidently recognizes that because in his trial brief he notes precisely that this Eleventh Amendment immunity is not available to Mr. Cohen in his individual capacity, and now asserts a qualified immunity, not with respect to the retroactive benefits, but only—

THE COURT: I'm troubled by that. Why, just because you sue some state official who has peripheral connection with this case, at best, why would he be liable in his [185] individual capacity?

MR. GILDIN: Your Honor, first we would dispute that he has peripheral impact, at best. He is the person responsible for the administration of the program in Pennsylvania. The problem stems from the fact—

THE COURT: But does he know anything about this case?

MR. GILDIN: Your Honor, he was responsible. I asked Mr. Chamberlin who the top person was and he said it was the Secretary of the Department of Public Welfare. The problem is, and the problem—and I won't get into a long harangue on this—is that the problem is that the Eleventh Amendment immunity recognizes that the money can't be paid by the state; we have got a problem here, that even if we realize a constitutional violation and the existence of damages, the choice is, should the loss fall on the victim or on the individual state official. And the Courts have said that in those choices, the least appropriate place is the victim, and maybe there is some unfairness on putting it on Mr. Cohen, but he can be indemnified by the state if there is a gross unfairness.

THE COURT: But that seems to me to be a round robin approach and one of the apparently normal convolutions of the law in this country; and I am very much in opposition to it.

[186] MR. GILDIN: And I am too, Your Honor. It stems from the proposition that even though the constitution pro-

scribes conduct by the states, that this Eleventh Amendment immunity that extends from older federalism principles is still lodged to hold them immune from those money damages. And given that inacronism in the law, the Courts have said well, given the choice—and an unfortunate choice—we will have the official bear the loss, perhaps recognizing that ultimately the state would reimburse them.

Similarly, Defendants Block and Heckler do not have the sovereign immunity protection to the extent they're sued in their individual capacities.

Your Honor, the Government's essential premise in this case is that individual religious beliefs must be sacrificed in the name of uniformity; in the name of what Mr. Hirt referred to as the system, even where the exercise of those rights has no effect on the system. This premise is entirely at odds, Your Honor, with the historical foundations of the First Amendment and of the American Indian Religious Freedom Act.

Indeed, the Government's principles and their premise is apothetical to the core concept that underlies constitutional rights, and something that distinguishes them from statutory rights, and that is that the rights guaranteed by the Constitution are not subject to the whim or the will [187] of what a majority of the people want to do at a particular point in time.

No Court has ever accepted the Government's proposition and we respectfully request that, and submit, that this Court should not be the first.

THE COURT: Now, what proposition are you talking about? I'm not sure I understand you.

MR. GILDIN: The proposition that because there is a general interest that can be served, and that the majority will benefit, that we can say to someone, well, your constitutional rights are in essence a minority view or an exception to the prevailing view and therefore you have to fall because the majority, or the system, wishes it this way. Those rights were created, Your Honor, out of a response to a system that worked that way, and did it to protect rights of the minorities from what a majority may determine to be what's convenient or efficient, or what's the beauty of the system,

as Mr. Hanger describes, because it's easier for the majority.

THE COURT: Well, what system imposed majority rule? I wasn't aware that that was the reason for the Bill of Rights.

What system are you talking about?

MR. GILDIN: Your Honor, it was a reaction in large part to the English system where it was decided that [188] rights of religious freedom would not be tolerated and the American Revolution, Your Honor, grew in large part out of the notion that they were no longer going to accept the concept that the Government could dictate most importantly the religious beliefs of the citizens.

THE COURT: But you said it was a majority rule and I wasn't aware that the revolution was against majority rule, it was against the Crown.

MR. GILDIN: You're right, Your Honor.

THE COURT: And the Crown's imposition of state religion and that type of thing.

MR. GILDIN: But they set up a system with respect to amending the Constitution, that you cannot have 51 percent of our legislators come in and say, well, we'll pass a statute that says Native American Indians should not hold certain beliefs.

THE COURT: Well, I'm well aware of that, that you can't deprive a person of a constitutional right by any legislative act, other than an Amendment of the Constitution.

MR. GILDIN: And Your Honor, our point is that that, in essence, is what the Government is trying to do here today. It's the system that benefits, and they are asking Mr. Roy and his family to give way to the interest of the system and uniformity even though they harm it not one wit.

THE COURT: Now, one last thing. Are you asking [189] us to declare any portion for the federal or state statutes unconstitutional?

MR. GILDIN: Not at all, Your Honor. We conceded that there is a general utility to the social security number requirement. As I stated in my opening, this is not a privacy claim that we think generally invades all citizens' rights.

It is Mr. Roy's sole religious beliefs and his wife's religious beliefs that are in issue here today. Their statutory scheme can continue unabated except insofar as they try to apply this requirement to deprive his family of these welfare benefits.

THE COURT: All right, thank you.

Who wishes to go first?

MR. HIRT: I will.

THE COURT: So that there is no misunderstanding, I think you are entitled to 40 minutes and we will give you a warning at five, is that fair enough?

MR. HIRT: I will try to still keep within 30.

THE COURT: All right. Well, do you think you are entitled to more than 40?

MR. HIRT: Pardon?

THE COURT: Do you think you're entitled to more than 40?

I had gotten into a colloquy with Plaintiffs' [190] counsel and I don't really know how long it ran.

MR. HIRT: Well, I don't intend to take more than 30, Your Honor.

THE COURT: All right.

Well, I'll warn you at 35, if you get that far.

MR. HIRT: May it please the Court, before discussing the applicable case law and how we would apply the facts of this case to it, I would like to just briefly go through some of the critical facts, as I see them, in terms of the two issues before the Court.

The first issue being whether Mr. Roy's objection to the social security number requirement is, first, sincerely held, and second, based upon a religious belief.

We have submitted, through cross examination and other evidence suggesting that there are inconsistencies which raise doubts as to each of these elements as to Mr. Roy's beliefs. I won't go into them in long detail here because the Court has heard the evidence. But, I think that we have a situation where there is inconsistency in terms of Mr. Roy and his testimony, when he discovered these Abenaki beliefs; how Renee, for instance, his eldest daughter, got a social security number, the inconsistency of his wife allowing

photos to be taken of their daughter Renee, the inconsistency of Mr. Roy's testimony in terms of identifying precisely what about the social security number requirement [191] he objects to. And that I would highlight and discuss in a little more detail.

Obviously, the testimony is such that Mr. Roy continues to provide his own social security number and I presume he will do so for any employer, if he applies for unemployment compensation; if he goes to Penn State University; if he engages in any other commercial activities.

Similarly, his wife and eldest daughter will also provide their social security numbers. I think that looking at the objection that has been raised, Your Honor, we do come down to many elements. One of the elements which Mr. Roy identified was the inability to use—to control the uses of social security numbers, and he did describe testimony comparing his beliefs to his objections to nuclear war, to the use of systems of computers, to what he called the attitude of people who use computers.

I think from the colloquy we had, the cross examination, Mr. Roy doesn't like or does not want a number which would be used by the system because he can't control it.

Now, I suggest that that is in part, at least, philosophical. It's related to the type of objections which people raise when they challenge social security numbers under the Privacy Act. The Privacy Act has a certain—is a statute which provides for certain uses to be authorized by [192] legislation and regulations, and there are many challenges by people saying, I don't like the uses of these numbers, it invades my privacy., It allows the computer system to tap into information which I otherwise consider private.

THE COURT: What?

MR. HIRT: Which I otherwise consider private.

THE COURT: It allows—

MR. HIRT: It allows the computer to tap into information—

THE COURT: I'm sorry.

MR. HIRT: —tap into information.

And I think that in part, Mr. Roy's objection comes out of that very—and I wouldn't say it's an unnatural objection—he uses the term "dehumanization". I think that is a shared belief of many people, but I don't think it can be tied down to the religious belief which has to be the fundamental basis for a lawsuit such as this.

Now, we do not challenge, Your Honor, that there are Native American religions or that people of Native American heritage have a religious tradition. I don't want to denegrate and I hope I have not offended anyone by our cross examination of Mr. Roy or Professor Driscoll. The problem in this case is to examine, under the case law, whether this belief arises out of a Native American tradition or specifically out of the tribe with which Mr. Roy [193] identifies.

THE COURT: Well, even suppose he were not identified with any tribe, why couldn't he have these as religious beliefs independently?

MR. HIRT: Well, Your Honor, the case law suggests that that issue isn't resolved. There are cases that suggest that at least you look to whether there is some body of knowledge out there, some organizational principles.

The Africa case, which is a Third Circuit case dealing with prison inmates, does discuss putting belief in context. I do know that there is a Third Circuit case also, of Lewis, where a woman in a social security disability context, although she was the only member of her church who had a particular belief, was held by the panel by a two to one vote, that her view was religious.

THE COURT: Well, it seems to me that every religion gets started by an individual, so far as I know.

MR. HIRT: Well—

THE COURT: And if you have a new religion starting, you start it with one individual.

MR. HIRT: I agree with you.

THE COURT: That person ought to get the protection.

MR. HIRT: I agree with you 100 percent, but those are not the facts of this case.

[194] THE COURT: That is true, but I don't quite see why that concept should not have some bearing on whether these are religious beliefs.

MR. HIRT: Well, I think that the concept—I think that if I can use the analogy I used in opening argument, which is a gauge or a rule or something to use as a guideline, if you have some sort of theory or background or contact of a shared group experience, that is more probative than someone starting fresh, and what I'm trying to say in this case is that I do not see that clear link between Mr. Roy's personal beliefs and an Abenaki religious or tribal culture, at least based on the testimony.

The other point, Your Honor, I would make in terms of injury, or in terms of interferences, there has to be a showing of substantial interference. I know that Mr. Roy is concerned about what he calls the rob or loss of spiritual powers. However, he did not equate it with a loss of what I would call going to Heaven. That was the analogy he used when he compared his belief to that of fundamentalist Christians who also objected to the social security number.

We also have no evidence before the Court as to what the tangible loss has been to either Mr. Roy or to his wife or to Renee, or even now, to their youngest daughter who, at least in some sense, does also have a social security number. [196] And we also have undisputed testimony that already in the Pennsylvania welfare system, there has been a unique identifier which has been identified to be Little Bird of the Snow, in terms of internal P[illegible]sylvania tracking system.

Your Honor, briefly, going to the other corroboration of testimony, Professor Drinnon. I won't say a lot about that. Professor Drinnon obviously is not an anthropologist, theologian, professor of religious studies. In fact, he did not even know the correct translation of the term "Abenaki" until I corrected him.

Now, obviously, Professor Drinnon said he believed that Mr. Roy's views were consistent with Native American traditions. He had to qualify his opinion, however, by noting that traditions have to be looked at in terms of the diversity of culture. And I think that much of his testimony that tried to draw on sources of western indians, whether the Souix or Yourk, or other indians, don't deal with the specific situation of the Algonquin culture group of the Abenaki tribe of which Mr. Roy comes.

Similarly, although there is this point that the Plaintiffs come back to that we can't separate culture and religion and what is religious and non-religious. Professor Drinnon conceded that Native Americans recognize the concept of soul and prayer. I think that rebuts the point that there can be no separation.

[196] And in fact, Professor Drinnon acknowledged that in our own culture there is the same overlap between the two. So, I don't think a distinction has been made between Native Americans and non-Native Americans for the purpose of Mr. Roy's beliefs.

The final point I would make about Professor Drinnon is whether his testimony was truly disinterested. Professor Drinnon was honest enough to say that he hoped Mr. Roy would win; that he viewed what the Government had done to Mr. Roy as in some sense part of a pattern of white versus Native American relations. I don't have any sense one way or the other whether Professor Drinnon is right, but at least his bias has to be taken into account.

And finally, what was Mr. Drinnon's basis for evaluating Mr. Roy's religious beliefs? It was basically only watching him testify in this case and in the administrative hearing. I think that all these points raise bona fide doubts as to the religious base for this belief.

The final point I would make before going to the second part of the case, which deals with the social security number requirement, deals with Karen Miller.

Now, Your Honor, at the close of Plaintiffs' case, I asked that she be dismissed as a party plaintiff. That was denied, as I understand it, because of Paragraph 61 of the undisputed facts which says—and I don't have it in front [197] of me—but basically says both Karen Miller and Mr. Roy object to providing a number for their daughter because they allege it's contrary to their sincerely held religious beliefs.

I submit, Your Honor, that we still have nothing more than an allegation on her part. We have no live testimony from Karen Miller, whether she shares her husband's—

THE COURT: Well, why do we need live testimony if there is an undisputed fact?

MR. HIRT: Because the undisputed fact, Your Honor, [illegible] says that they allege that it's contrary to their Native A[illegible]an beliefs. What I'm saying, Your Honor, is that the [illegible] before this Court is whether in fact it is contrary to her Native American belief, if she has them. And I submit that there is no evidence whatsoever to that point, and I think that the failure of Plaintiffs to call a witness over which they have this unique ability to call, can give rise to an adverse inference, and I can cite cases to that effect. But it's a well known doctrine that if a party has a witness peculiarly within their control, such as a wife, or a husband and wife situation, and they fail to call that witness, it gives rise to an adverse inference.

I would also note, Your Honor, that we don't really have any testimony suggesting that Karen Miller has the same views as Mr. Roy on this issue.

[139] First, we don't even know whether she is an Abenaki or Native American, and she got a social security number for Renee; she took pictures of the children, although clearly Mr. Roy objected to that type of practice.

THE COURT: I don't remember that there was testimony that she took the pictures. I thought the pictures were said by Mr. Roy to have been taken by a member of the Miller family.

MR. HIRT: Well, I—we would have to go back and look at the testimony, but I believe when I asked him this on cross examination, he acknowledged that she had—I don't think she physically took the picture, but she allowed the picture to be taken; I'll make that distinction.

THE COURT: I see.

MR. HIRT: I think the testimony will show that, Your Honor.

Let me turn, Your Honor, to the other part of this case which deals with the social security number.

Now, the Plaintiffs in this case have conceded certain facts. One fact I would just note for the record is Paragraph 39, which talks about the magnitude of the system requiring computers. Plaintiffs have conceded that.

And I think that looking at Mr.Roy's objections, before you even have to get into whether we accommodated or

whether the interest outrides it, we do have to talk about [199] what the objection is.

And I think that to the extent that the Plaintiffs have admitted that we need to have computerized welfare systems, to the extent that Mr. Roy objects on religious beliefs to input of data concerning his family into computerized systems, I think that there is no accommodation. Because the Plaintiffs have conceded a computerized system, and I don't think that Mr. Roy can maintain that religious belief and yet still be accommodated because, as I understand it, he objects not only to computers, but to the way computers are used by people. It does not just deal with the social security number as a unique identifier.

Your Honor, without going through the testimony of each and every witness, let me just summarize the highlights as I see them and then in my remaining time I will discuss how I view the case law as affecting this issue.

First, Your Honor, we talk about the various uses of the social security number, most of which Plaintiffs do not contest. They object, of course there, to their relevancy in this proceeding. We have the use of social security numbers as identifiers. We have them used in the Pennsylvania welfare situation in what is called the intrajurisdictional match, where a family goes from one county, let's say, to another county.

THE COURT: I thought they also were able to do [200] that by name.

MR. HIRT: Well, Your Honor, the testimony seems to be that the name can be used, but the testimony on the other hand is that the social security number is the vital link because of problems in using names.

THE COURT: I didn't think it was the vital link. It seemed to me it had a ratio of plus 200.

MR. HIRT: Well, that is the matching based on that FAMIS document. It was plus 220, I believe, for the social security number.

THE COURT: All right, 220. Well, there were others that were very close to that and I was surprised that they had the weight they did.

MR. HIRT: Well, Your Honor, without getting into the FAMIS system document, I think that, you know, I have objections in terms of how that document was used by the Plaintiffs.

I think that Mr. Stauffer explained the context of that document in the match, but I think that what he emphasized was the social security number is a nine figure configuration which is not capable of the same type of errors such as the spelling problems or people with similar names.

THE COURT: Well, then why doesn't it have a tremendously greater weighing value?

MR. HIRT: Well, Your Honor, I can only come back [201] to the point that this was a design by a certain person who came up with this weighing system, but Mr. Stauffer said that the document was not used in terms of the Region 3 process. So, I'm not going to vouch for those numbers one way or the other. I think that the numbers show that the social security number is an important criteria. The only one which I thought came close was last name.

THE COURT: Well, I think the county is very high, isn't it? Much to my surprise, the county is quite high.

MR. HIRT: Well, yes, Your Honor, but Mr. Stauffer was talking about—I think he tried to clarify—you're talking about people in the same county. You are matching people—the county information is the same, that gives you confidence of a match.

THE COURT: The county is 270 and the social security number is only 220.

MR. HIRT: That's right.

THE COURT: That is very surprising to me, particularly if you don't make a distinction between Philadelphia County and Lycoming County.

MR. HIRT: Well, I think that is the point that that distinction has to be made.

THE COURT: But it isn't made, according—

MR. HIRT: It is not made on the document, but I believe Mr. Stauffer tried to make that clarification.

[202] THE COURT: Well, he never cleared it up for me.

MR. HIRT: Well, Your Honor—

THE COURT: He didn't even come close to it.

MR. HIRT: Well, if Your Honor would look at it from a point of logic, if you have a match between counties, if you have a different county name, you won't have any match at all. If you are trying to match a name that you think is in Lycoming County with a name in Philadelphia County, you won't—if you have a name like Miller in Lycoming County, obviously, if you are trying to match against some other county, you're not going to get that same match in the other county, because the counties won't correlate.

THE COURT: I don't understand what you are saying at all. But, I thought this county business related to the matching within a county.

MR. HIRT: That's, I think, the point. If you get two Millers, if you have a Miller come in and you punch in certain data elements and you get in response, here is a Miller also within Lycoming County, you have got good confidence that that may be the same Miller because you are dealing with a very small universe because how many Millers with certain identifying information can there be within a certain county. But that has no relevance, Your Honor, to one county versus another county. That was, I think, what Mr. Stauffer was trying to say, and the document does not [263] speak very well to that point.

THE COURT: All right.

MR. HIRT: But, in terms of the matches, though, Your Honor, I think that from the standpoint of the system, we are concerned with several types of matches, not merely the county-to-county match that might be within the state. We are talking about comparing county files to tax files, to employment security files, to medical assistance files. We are talking about the county trying to interface with federal files and we are also talking about the very important example of adjacent counties in states such as Pennsylvania and New Jersey, which border each other.

THE COURT: But how does all this relate to this little girl?

MR. HIRT: This little girl as an individual?

THE COURT: Right.

MR. HIRT: Well, Your Honor, if we take the Plaintiffs on—if I can say this—the battlefield of which we are fighting

this at the moment, which is, do we look at this system from the standpoint of one girl, one household, as opposed to the uniformity of the system overall? I think we still have two potential problems. The first problem is that—and I think this system has the right to make this judgment—is that we do not know whether this family will move. We know that the family, in fact, [204] already during the pendency of this lawsuit, is moving from one county to another. Why can't numerical identifiers be used in case that family or part of the family decides to move to Upstate New York, because the problem is a potential for misreporting of income.

We have the problem, Your Honor, and it's been identified from Mr. Chamberlin's testimony, that case files are maintained under different names. We have the potential problem, Your Honor, that the family could try to qualify for welfare under different names. Miss Miller under her name, let's say with Reese, Mr. Roy with Little Bird of the Snow under his social security number.

So, there are plenty of possible situations where mispayments might enter into that system and social security numbers, the testimony has shown, are important for children because that is the way you protect against people, for whatever reason, not reporting the exact number of children who are on the benefit rolls.

There could be a situation, hypothetically, where this family could move and maybe the wife would split up with the husband temporarily, and say, I want welfare in my name. Let's say the custody over these two children wasn't clear, could they both collect in Pennsylvania and also collect over the border in New York? That clearly is contrary to the system, and yet, without social security numbers, that is a [205] good possibility. It goes back, in fact, to the deterrent value which Mr. Conrad talked about, which is that people knowing that there is this item of verification, may be less likely in the future to go after this system, or to try to get around the system of verification.

Obviously, Your Honor, we do not believe that Little Bird of the Snow is going to collect wages. Absent her becoming a movie star or something like that, the only occupation I know of where little children still get involved, she wouldn't

be in the work force. Obviously she won't [redacted] receiving unemployment compensation, so we still have [redacted] problem, which I submit is not theoretical to the potential which is children being miscounted or non-counted.

And you also have the possibility, which several witnesses identified, of keeping track of people for their medical assistance records, which has a different purpose that of making sure that their medical screening is done.

Your Honor, of course the problem with the way the case is as I see it, and it's only from the standpoint of the federal Defendants, is when you look at a single situation, are we taking the Plaintiffs at their word? In other words, does this come back to uniformity? If you have a family that says we are going to abide by all of the rules of the system, we will not allow you to check us, should that be accepted? And that really is the issue.

[206] Should we take people at their word? Should we say yes, we say you're acting in good faith, we won't make you get numbers. But a caseworker in Centre County will say, well, I don't like the way you look. I'm going to make you get a social security number for your children. Or, are they going to wait until the child is 8? Are they going to wait until the child is 15, 16, 17? What stage do they enter the work force?

Your Honor, I think that the system operates the way it does for everyone's benefit, and perhaps everyone's burden; that everyone is similarly situated. And the family may say, we have no intention of committing fraud, but I submit that that isn't the relevant inquiry.

THE COURT: Well, why didn't we hear something as to what effect the granting of the immunity by Judge Weinstein had on the social security system of the New York welfare system? We haven't heard anything about that.

MR. HIRT: Well, Your Honor, I agree, because one thing, I don't know what the effect is. I think that—

THE COURT: Well, I know, but why don't we have some evidence on that?

MR. HIRT: Well, Your Honor, the only evidence that we have in terms of the effect is evidence I can go into as to the potential effect in terms of the issue of the daughter carrying

the number or of the blank social security [27] number being entered into the files, as Mr. Hauger described.

Your Honor, I think that the problem that we have, frankly, is that the system I do not think will break down because a single family is exempted. I mean, I think, without conceding something, that the food stamp program is not going to grind to a halt because one person is exempted. I think that the problem we have is that in view of the case law which the federal Defendants have might differ from this Court in the way that the Court has followed the Callahan decision, because we submit under precedence such as United States versus Lee, that that is not the proper inquiry. That you do not look at the marginal cost of exempting one single household from the system. You compare the importance of the system generally to the type of objection raised and you look at whether there are real alternatives that would be alternatives to the entire system. You don't just look to the single individual.

THE COURT: Well, what—

MR. HIRT: But I don't think—

THE COURT: —circuit is that? Is that the Ninth Circuit?

MR. HIRT: Ninth Circuit, that's correct.

THE COURT: That is not binding on us.

MR. HIRT: That's correct.

THE COURT: And to me the important thing here is [28] the religious aspect of it, and if its—what it's going to cost, not in dollars, but in efficiency or in any other factors, what is it going to cost the system to accommodate religious beliefs if we find that these religious beliefs are sincerely held and that they require an exemption.

MR. HIRT: Well, Your Honor, I think that the problem comes, that you really can't evaluate a cost of having essentially part of a household fall out of this verification system; that they are invisible to it. You have the situation which I have outlined, the potential situation where you would not be able to match and locate children if there is a change in household status. In other words, if we posited a possible situation where the one part of the family moved across the border to New York with different names such as Miller,

which is, I think Mr. Hanger testified, one of the number six most common names in the United States.

THE COURT: Yes.

MR. HIRT: If she used her name and, you know, we have that potential, I suppose the potential loss would be the welfare benefits that they would earn that they otherwise weren't entitled to if the financial eligibility requirements were met.

It's impossible, Your Honor, I think, to quantify in terms of all these other matches, how the system will operate, because you have the problem across state lines of [209] not making the match at all; not making what was testified to as the hit.

You also have the problem, Your Honor, which is, maybe down the road, as Mr. Hanger said, of the scrambled earnings problem which is, if you have the two of them sharing a social security number, you're going to have that problem.

THE COURT: All right. Well, I have come up with a solution to that. I have asked about it today. They are certainly willing to have this—have any injunction, if one is issued, terminate on December 26, 1996—yes, 1996. That would solve that, I would think.

MR. HIRT: Well, Your Honor, it might solve that problem, but I think in terms of talking about children, we come back to the problem of misreporting of income, misreporting of identity of children and we have the medical assistance problem, and across state lines. I don't see how that problem can be solved.

I don't think a cross figure can be put next to it because you just wouldn't be able to make the match, and if the match isn't made, how can you save the cost. The cost is that you have foregone detecting these benefits.

And of course, we do have the potential problem of unearned income, which is that potentially money could be set aside, let's say, in a bank account, and we don't know [210] whether or not that would be reported, and how it would be covered if there were no social security number for the child entered.

Again, I don't know whether Little Bird of the Snow has a bank account in her own name right now, or what its limit

might be, but I think the system asks this information for the potential, not that it occurs right now, because there is not this same sort of follow-up to keep track of people's volunteering, let's say, this information. Perhaps they are supposed to volunteer, but the computer will not have an independent means of verification that is effective.

Your Honor, if I just can focus a few minutes on some of the other testimony, and particularly what Mr. Gildin talked about. We do have the problem in terms of the reliance upon that document, the FAMIS system, in terms of whether it was as Mr. Stauffer characterized, a document not in use, as opposed to the type of use which Mr. Gildin used it for.

Plus, we have the problem that although benefits obviously are given during the initial stage of what is called the Type 3 error, the presumption in that system is that the family is in a bona fide effort to get a social security number, and obviously the testimony has been that you don't refuse to give people benefits in this emergency [211] situation at the entry level situation; you will give them a certain grace period to get a number and the benefits will keep flowing, at least until the point that the system—excuse me—that the welfare department is satisfied that there has been a good faith effort, or the family says we aren't going to give a number, then the decision has to be made.

I think, Your Honor, I have talked to some extent about the alternatives: the sharing of the same number raises the scrambling of earnings problem. Mr. Stauffer said that the Pennsylvania system wouldn't really tolerate a dual use of social security numbers, and Mr. Hanger identified the problems of posting to the proper earnings for retirement purposes.

We talked about whether the allegedly unique name could be used. Again, we have the problem of interfacing, or dealing outside of the Pennsylvania system. It may be fine if they remain within counties so that the search may be more difficult, maybe it can be done, but we are talking about potential matches as both Mr. Stauffer and Mr. Conrad and Mr. Chamberlin said, about a lot of system for a lot of purposes.

And the social security number, it's undisputed, is certainly one of the reliable identifiers. And there are plenty of problem with last names, and configurations of [212] middle names, and we have the common name "Miller", as one best example of that.

THE COURT: But it seems to me that the chances that there is going to be another Little Bird of the Snow Roy, or Little Bird of the Snow Miller, may fairly be dismissed as negligible.

MR. HIRT: Well, Your Honor, I don't know. If one can hypothesize one way or the other, I suppose we have the other problem which is, as some of the witnesses talked about, is how names are entered into these computers, in terms of shortening the names, adjusting the names. We also have the potential that—

THE COURT: Well now, that business about adjusting the name, I couldn't figure that out for the life of me this morning. I didn't understand why the gentleman was having so much trouble figuring out how you would enter this name.

He said you could not combine the first names, so you couldn't have a Mary Louise, it would have to be Mary. Then it's obvious to me that the first name here would be "Little" and the combination is the second one. I would have thought that anybody in the social security system who had anything to do with assigning numbers and consideration of names would have recognized that.

MR. HIRT: Well, Your Honor, I respectfully [213] disagree, because I can think of many scenarios where either the family puts it in a different block. Miss Miller may put it in a different block than Mr. Roy. A welfare worker, filling out a form for them at the local level, may do it in a different way, and if you look at the term "Little Bird of the Snow", in a French term, if one translated that one might well have Little Bird—I don't know what it would be—Le Petite Oiseau la Neige. So "Neige" would be the middle name.

One can have several alternatives that would say, "Little, Bird of the Snow", "Little Bird, of the Snow", and in terms of computer configurations, Mr. Hanger, I think testified, you're talking about fitting them within certain fields.

THE COURT: Well, I imagine you would have trouble if you were going to translate it into Sanskrit, but we're putting this in English.

MR. HIRT: Well, but you're talking about "of the Snow", is that a modifier? Is it "Bird of the Snow", is it "Little, Bird of the Snow"?

THE COURT: Well, whoever did it didn't have any trouble in figuring out that the first name was Little, and the middle name was the rest of it.

MR. HIRT: Well, but maybe some other person might differ. It just happens that that was the way it was done here, is my point.

[214] Your Honor, I think that the final point I would make in terms of the accommodation issue, before I talk briefly about the case law, is that I don't see how anything that the federal Defendants and the state Defendant could do would accommodate Mr. Roy.

I think it's because his objections, at least as I understand them, are interrelated and may be independent, and they can't be separated out to say, if you do a certain thing one way, he will accede to a number. He objects to the unique nature of the social security number. He certainly objects to the widespread potential uses of it. He objects to his inability, he says, to control it. He says that it deprives him of his spirit, and he objects to its being used in computers.

I don't see, under any of the alternatives that have been posited, especially the computer ones, how this can be accommodated. And I think that a lot of his concerns just cannot be addressed in any sort of system. I think the alternative he is proposing to the Court is that the family, at least Little Bird of the Snow, not be placed into any sort of computerized system for verification, and I don't think that under any standard of the case law, that the Federal Government need to accommodate that sort of concern.

If I can turn briefly to the cases, I just want to discuss them for a couple minutes, and then a few of the [215] ancillary points such as damages and injunction.

Your Honor, talking about the precedents, we have relied in our briefs upon one case in particular, United States versus Lee, which dealt with whether various people of the

Amish sect should be exempted from social security taxes. And the result in that case was that the Court held that their objection to contributing had to yield to the public interest.

In terms of the dialogue which you had with Mr. Gildin concerning the relationship of deeply held religious beliefs and practices to uniform requirements, the Court said, "to maintain an organized society that guarantees religious freedom to a great variety of faiths, requires that some religious practices yield to the common good. Religious beliefs can be accommodated, but there is a point to which accommodation would radically restrict the operating latitude of the legislature."

So, the Supreme Court has recognized that in some situations, no matter how deeply felt the belief, no matter what the potential is to the person in terms of their spiritual life, that in some situations those interests must yield. In various cases people have alleged, such as in a polygamy case, that if they couldn't practice polygamy, they would be damned forever.

In one case involving hand bill prohibition, the [216] Prince case, the parents said that if she couldn't have her children distribute hand bills of a religious nature with her, that that would also condemn her to what, I suppose would be hell in her terminology.

So, the issue is not necessarily what the Plaintiff says the consequences will be, it again comes down to the balance. The balance in United States versus Lee, Your Honor, was not based upon a showing that if a certain group of Amish believers were exempted from the requirement, that the entire tax system would fall and that our deficits would be raised a particular billion dollars. The Supreme Court basically said this is a uniform system, the Amish belief, however sincere, must yield. That is what we submit to be the proper analysis of the case.

Now Your Honor, in his summary judgment, has put us to a different test, which is a test similar to Callahan. We submit that while we disagree with that test, respectfully, we believe that we have shown that we have a situation where the Government's interests in maintaining an efficient and

fraud resistant system would be compromised by this type of exemption.

And I again come back to the potential for fraud, the potential for non-identification of children as well as the other ramifications of adjusting the system that the witnesses have talked about.

[217] Again, the costs incurred if an exception is made are not easily quantifiable, but Mr. Hanger did talk about the problem, for instance, of reprogramming computers to accept a blank social security number; in other words, the space is blank for a social security number.

And again, how do we perform this type of function if a jurisdiction wants to do matches across state lines and interface with other computers. That is quite apart from the intangible, but I think significant cost of less effective matches.

The final few points I would make, Your Honor, is—does that mean I have five minutes?

THE COURT: Five minutes yet.

MR. HIRT: Thank you.

We have, I think, a problem with the nature of a permanent injunction, obviously, and an injunction that terminates at a certain point in time, I also find troublesome. I don't think any injunction, obviously, should be issued. I wonder whether the onus should not be on the Plaintiffs because the Plaintiffs have represented in some way that they will discuss this issue with their daughter.

And, Your Honor, I wonder whether it's really up to the Plaintiffs to inform the counsel and this Court as to whether their beliefs have changed or whether their daughter has had this issue discussed with her; that the onus should [218] not be on the Federal Government or the State Government to have to inquire into this issue or move to modify an injunction.

Your Honor, I think that what we have here, Your Honor, is to some extent a situation where the parent, one parent, apparently is making the decision for the child. The decision to get a social security number, obviously, has other ramifications, the getting of a motor vehicle license, getting a job, or anything else. We're talking about a matter of timing and

not of permanence, because although Little Bird of the Snow does not fit within some of these requirements right now, as she gets older she will, and I wonder whether a permanent injunction possibly can issue in this type of case.

THE COURT: Well, you see, I was suggesting or positing a permanent injunction which would terminate automatically when this little girl attains 16. That wouldn't require anybody to do anything until that time and then if she wanted to earn, she would have to go ahead and apply for a social security number, or seek an exception on religious or other grounds. I don't see where that puts any burden on the Federal Government to do anything.

I clearly want to reiterate that I haven't decided this case. I think this is a very close case, actually. Very close.I don't even know which way it's going to go [219] yet.

MR. HIRT: Sure, I understand.

The other point of an injunction about withdrawing the number from the files, of course, I can't speak to either at this point in terms of what that means. But, we would leave that open, of course, assuming that there was an injunction.

The other point I just wanted to mention briefly is the damage issue, which I still find to be troublesome, because, in terms of the state Defendant or the federal Defendants, I am not aware, up until the time of the pre-trial conference, that anyone in the Plaintiffs' eyes had done anything wrong in a personal way. And certainly there has been no showing that any of the federal Defendants have in any way been involved in any improper way in being heads of the department which administer this requirement.

They're enforcing and implementing a congressional requirement, and I don't believe that there is any basis in the case law or the facts of this case, or in terms of the way that this has been raised at the last minute, for any assertion of damages against any of the Defendants, and we would brief that if it ever came down to the point of qualified immunity and the type of issue raised by the Harlow versus Fitzgerald case. But, I don't consider that type of allegation to even be proper in this type of case.

[220] Your Honor, I think I would conclude, as my time is probably up, by saying that the federal Defendants believe

that the importance of the uniformity of this requirement cannot be adjudicated on a case by case basis, or looking at one frozen point in time at a particular plaintiff or a particular household. It's a system which functions, which is related, which is national in scope, which has many interrelationships and I think that the case law and the facts of this case support entry of judgment for the Defendants; that the type of analysis, whether it's the Callahan analysis, whether it's the type of analysis of United States versus Lee, still requires a judgment in favor of the Defendants.

THE COURT: Thank you.

I think we will have to have a ten minute recess and I hope that's going to be enough time. We will give, as we will, Mr. Ressler forty minutes, may be running so close to the time that you have to leave, Mr. Hirt, but I don't see that is going to trouble you anyhow.

MR. RESSLER: Your Honor?

THE COURT: Yes.

MR. RESSLER: My closing will not take anywhere near forty minutes.

THE COURT: All right. Well, the Court Reporter wants ten minutes and I think she ought to have it.

(Brief recess.)

[221] THE COURT: Please be seated.

MR. RESSLER: Your Honor, if I could use a saying to start my closing, it appears that in trial, that facts will come out. I believe that even in this short a trial, we have had a number of facts come out which no one anticipated.

Most startling, from the Defendants' standpoint, the fact that Little Bird of the Snow has a social security number, and that Plaintiffs knew that, and Plaintiffs' counsel knew that.

And I would first like to address the question of mootness. I believe the testimony of Mr. Roy, and I believe he reiterated this several times, was that since he already had a social security number, the damage was done and that there was, therefore, no point in his stopping to use his number. And the same thing was true with respect to his daughter, Renee. She had a social security number, nothing could be done about it and that was the end of it.

Now, we had testimony from Mr. Hanger today that once a social security number is issued, that really is the end of it. Even if the person who got that number would complain and ask for a new number, and the Social Security Administration in its discretion would furnish a new number, the old number doesn't go away. It's there forever. And it can be cross-referenced in. That was the testimony.

Now, Mr. Roy testified on rebuttal that someone in [222] the Social Security Administration told him the number could lay dormant, but he didn't identify who that person was. He didn't bring in the letter. He offered no proof to substantiate his assertion that that is what he was told.

The fact is, the only proof on this record was proffered by Mr. Hanger, and that is that when a number is issued, it cannot be recalled. In fact, when that testimony—

THE COURT: Wait a minute. I don't understand that. You say when the number, is issued, it cannot be recalled.

MR. RESSLER: That's correct.

THE COURT: Well, I'm—perhaps you're not using the word "recalled" in the sense of a memory recall.

MR. RESSLER: No, Your Honor.

THE COURT: Well, I think we ought to—the computer is very like the brain. The software is like the input and the brain is like the hardware, the brain itself. And so, when we—I always think of a computer as a brain and when you use recall, I was thinking of output from a computer, so I missed the thrust of your statement.

MR. RESSLER: Your Honor, my point was, that once a number is assigned—

THE COURT: It cannot be obliterated.

MR. RESSLER: It cannot be undone.

THE COURT: Well, I think that is true of the [223] brain, too, myself. I have never seen any medical assertion to that effect, but I personally believe that once you know something, you never really forget it.

MR. RESSLER: And Mr. Hanger also testified that the number had been provided to the Internal Revenue Service.

Now, Mr. Roy, on cross examination, he was asked, well, what uses do you object to, and if the uses were restricted, would you still have your objection; and he couldn't really

answer that question. So, we don't really know whether the case that the number has already been put to any objectionable, because Mr. Roy himself doesn't know what his religious beliefs dictate.

And of course, he doesn't necessarily have to have an absolute fixed belief, but he hasn't really given the Court any guidance either, and we submit that was the Plaintiffs' burden.

Now, Your Honor, the primary thrust of this case is injunctive relief which was directed towards what has now turned out to already have happened. The Plaintiffs did not want to have to get a social security number for Little Bird of the Snow. The fact is that she already has one. Whether she wants to use it or not, or whether they want her to use it or not isn't really the case, because that wasn't how it was structured.

The entire thrust of this suit was whether they [224] had to get the social security number, and since that is done, really, it's hard to see why we are still here. I do understand why we're here, we're here because this just came up, but it seems to me that that really moots out the case.

Now, of course, Plaintiffs will say they have a claim for damages and that the damages aren't moot. The first point is that certainly with respect to the back welfare benefits, this Court has already ruled.

With respect to their collateral claim of damages, I—the question I put to the Court is this: The Plaintiffs' counsel has cast his case in First Amendment terms that they have a free exercise right not to have to get this number. But then, when Defendant Cohen asserts to the Court that he has a constitutional right under the Eleventh Amendment of the Constitution not to be sued in Federal Court, the Plaintiffs scoff at that.

Now, Your Honor, the Constitution is the Constitution, and if the First Amendment is important, so is the Eleventh Amendment. And we submit that the Plaintiffs cannot ask this Court to overlook the Eleventh Amendment and devise a technique for stepping around it.

THE COURT: Well, I don't understand that. It seems to me it's not unusual to have conflicts between constitutional rights. I think we have them all the time.

We have a conflict between the right of a [225] defendant to have a fair trial, and the right of the news media to information. It seems to me there is very frequently conflicts between one constitutional right and another one. We don't just cancel one out, we balance them insofar as we can, and come up with the right result, is that correct?

MR. RESSLER: Well, Your Honor, I wasn't positing a conflict. The First Amendment does not guarantee a damaged remedy. That is not a constitutional right.

THE COURT: Right.

MR. RESSLER: I'm saying that Defendant Cohen, who is clothed in the state, and who is the Secretary of public welfare, and who, in fact, was not the Secretary of public welfare when Little Bird of the Snow was taken off assistance; that he has Eleventh Amendment immunity from suit. And that that immunity extends to collateral claims for damages, because, as the Plaintiffs themselves in their closing statement in colloquy with the Court said, that, "well, if that was unfair to Defendant Cohen, he could have the state indemnify him". Well, that is precisely what the Eleventh Amendment is supposed to prevent. I will lay that to the side. I really don't see that as an issue anymore because this Court has already ruled on the motion for summary judgment. I only mention it because Plaintiffs' counsel has attempted to resurrect the issue.

[226] Now, Your Honor, of course the test in this case, the first step that we must go through is to determine whether the belief in the evilness, let me say, of the social number—

THE COURT: Evil is, I believe, the noun.

MR. RESSLER: Evil, in the evil of the social security number: whether that is religious in nature.

Now, we're not really saying that Mr. Roy, or we are not necessarily saying that everything Mr. Roy does, that his talking to the fishes or, as he puts it, and singing the sun to sleep, we're not—the issue isn't whether those are religious beliefs. And it could very well be that Mr. Roy does those things and that they have religious significance to him, but that's not part of this case. The fact that some of the things that Mr. Roy does are religious, does not mean that everything he does is religious.

Now, of course, Mr. Roy attempts really to circumvent this hole in his case by saying that everything that he does is religious, and that no distinction can be made between those things he does that are secular and those things that are religious.

Now, the Third Circuit rejected that reasoning in the Africa case. In Africa, which was decided in 1981, Judge Adams specifically addressed the contention of Frank Africa, that everything he did was based on his religious beliefs. [227] But the Court said that that is not enough. I mean, a claim like that is meaningless for analysis, that the Court has to go beyond that and look to the particular claim that is asserted, and look to see what indicia of religion does that claim have. That is really what we have to look at.

THE COURT: All right. Now, somebody coughed and I missed the phrase "what indicia of religion does"—go ahead with the rest of the sentence.

If you've forgotten it, I will have her read it back.

MR. RESSLER: Perhaps it would be best.

(Statement beginning "I mean, a claim ..." on Page 93, line 1, was read.)

MR. RESSLER: Obviously, Your Honor, eating and breathing are acts that people do, and even though it may be that the Creator in western religion, or God, has instilled in peoples' bodies eating and breathing, does not necessarily make them religious. We have to look in the context of how the claim is asserted.

Now, in this particular case, we have a context that the social security number is related to computerization and it's related to the evils of nuclear power.

Now, whether that context and—and is therefore evil and must be avoided—now, whether that context is a religious context, I believe it is certainly a matter of [228] dispute. There no question that numerous people, perhaps a majority of the people in the United States believe that nuclear power is bad. In fact, if I may point out to the Court, in my home county of Dauphin County, a referendum was passed by the majority of the voters of that county opposing nuclear power. So, that is not—and in fact, the very fact that a referendum was passed would mean that that particular prob-

lem is political in nature, not religious, because if it was religious, why was it put to the voters in a referendum.

Now, Plaintiffs' expert testified that Mr. Roy's beliefs were consistent with that of indian belief or Native American belief. But, he also testified that they were consistent with the beliefs of Henry David Thoreau and, of course, Chief Justice Berger, in the case of Wisconsin versus Yoder, characterized Thoreau's beliefs as philosophical, not religious.

Now, Your Honor, during Mr. Hirt's closing, the Court asked him why is it important that we look to Abenaki belief and not indian belief as a whole, or even why can't we have a religion of one and look at the case in that context.

Well, this case was framed in a particular context by the Plaintiff, and in the Plaintiffs' complaint, the Plaintiffs' claim that the basis for his religious objection is based upon his beliefs as a native Abenaki. He does not claim that the basis for his objection is simply that he has [229] religious beliefs, or that the basis for his objection is because he's an indian or a Native American. His—the basis for his claim, as framed in the complaint, is that it is contrary to his beliefs as a native Abenaki.

Therefore, when the Court examines his claim, it has to examine it in the context of Abenaki beliefs, and I believe that is really the answer to the Court's question, why we threw that in there.

THE COURT: All right.

MR. REISLER: Finally, I would point out that, although Mr. Gildin pointed out correctly that the ultimate superior—and I'm turning my focus, Your Honor, to the question of what remedy is available—that the ultimate superior of the people who took the actions that are contested in this case, is the Secretary of public welfare. I believe this Court is very familiar with the principle that liability under Section 1983 does not lie under a theory for respondeat superior, and that there must be positive personal involvement for liability to lie. There has been no personal involvement shown, and we submit that on that basis alone, the remedy of damages is inappropriate.

With respect to the injuctive relief, I think that the important thing to remember is that this is Mr. Roy in Court seeking this injunctive relief on behalf of Little Bird of the Snow. He is asserting his religious objection. [220] At some point Little Bird of the Snow herself has to speak to that.

When I questioned Mr. Roy about when he was even going to discuss the matter with Little Bird of the Snow, he said he hadn't really thought about it. I ask the court, how can this Court enter an injunction against the Defendants to aid someone who has not been before this Court, and whose—and the person who brought the suit has no intention of ever involving her in the near future.

At some point, the Court must look at whether Little Bird's religious beliefs are being infringed.

Now granted, perhaps that can't be done today, but I think it can be done well before Little Bird becomes 16, and on that basis, we would certainly oppose an injunction which terminates at the point that she turns 16.

And, in fact, that is the whole problem here. The Plaintiffs are trying to obtain an injunction based on facts that could change over time. One day Little Bird might say that she thinks this is all a lot of hooey. We don't know that, and maybe she won't, but she might, too. She's not here to testify, and, of course, she can't, but how can the Court speculate on that and decide whether to do something as drastic as issue a permanent injunction.

Again, as has happened in the past, there could be discord between Miss Miller and Mr. Roy. They seem to have a [221] non-traditional marriage.

Now, I don't know what that means for their future, but certainly they have moved from county to county and they may move again, and at some point they may split up.

The testimony that we have heard in the last few days from Mr. Roy all assumes that they stay together. But that assumption doesn't have a lot of credence in the record.

There was testimony from Mr. Chamberlin that when Mr. Roy and Miss Miller come to the welfare department and applied for benefits, they always insisted that they're separate people, and that is why they have been given separate cases. Well, Your Honor, then they come to this Court and say they are very cohesive. Certainly some doubt raised in my

mind as to the credibility of their testimony, either today or what they have told the welfare department in the past.

When the Court weighs whether an injunction should issue, that fact certainly has to be taken into account.

I won't go any further because I believe that Mr. Hirt has amply set forth the law, and the facts in this case. And I appreciate the Court's indulgence in attempting to fit the Court's schedule into my travel schedule.

Thank you, Your Honor.

THE COURT: I hope you have a pleasant trip.

MR. RESSLER: Thank you.

[232] THE COURT: Yes, sir.

MR. HIRT: Your Honor, before Mr. Gildin starts, I want to make clear that I—and I didn't say this in my introduction—that I relied upon Mr. Ressler to present the mootness issue on my behalf, rather than my repeating what he said earlier.

THE COURT: All right.

MR. HIRT: So I incorporate that.

THE COURT: All right. How much time do you have?

MR. GILDIN: I think I've got five minutes, if I'm correct.

THE COURT: Is that going to be too short for you?

MR. GILDIN: I hope not, but—

THE COURT: All right.

MR. GILDIN: I know we have some proposed additional findings of fact which, because the Xerox machine is broken down, we can't make the copies to hand Your Honor now, but can we file them with the Clerk before we leave this afternoon?

THE COURT: That will be fine.

MR. GILDIN: I believe I may be speaking for the other side as well.

MR. HIRT: Yes.

THE COURT: All right. You can leave them with the Clerk of Court—that way, and tell them that—tell [233] her that I asked that two copies of them be made, one for the Law Clerk and one for me, and then we will use those with your other ones.

MR. GILDIN: Your Honor, with respect, first, to the issue of whether the Plaintiffs' beliefs are religious. Your Honor, I submit that we have heard argument under a total disregard of the absent legal standard, and it's not whether Mr. Hirt or Mr. Ressler or their clients think that it is religious, indeed, the Court is not supposed to, nor should the Government be questioning whether those beliefs are true or false because they believe them to be somewhat unusual from their perspective. Which leads to this very claim at the end, belated effort, to try to moot this case out.

We heard Mr. Roy testify that it was always his understanding that that number was to lie dormant and that it would not be used to deprive Little Bird of the Snow of greater power until perhaps some day she decided to use it. And he testified that he here, even at this moment, thought that that was true, although now that the Government had decided to come up and decide to attempt to argue that that number was being used, that maybe that would be some problem if this Court could not order that number withdrawn. But, as of yet, it had not done that harm.

What the Government has done here, Your Honor, is [234] as if they came running into Court and saying, Judge, the case is moot because we assigned Little Bird of the Snow a number. We distributed it in our computer system, and therefore, we deprived her of the greater power.

While Your Honor analogized about computers and brains, there is a vital difference, and that is brains would require some biological action to remove their memory, which is not true of computers.

And their continued insensitivity to his religious beliefs; their continued efforts to take steps that would somehow deprive her of greater power, confirms perhaps the evil that may be attached to these numbers in Mr. Roy's view, and makes doubly essential that in addition to the relief that we originally sought, that some mechanism be used to take that number out of the computers so that the Government can't continue to try to use this.

THE COURT: Well, did you submit, at any point, a form of proposed injunction?

MR. GILDIN: Your Honor, at the time we did submit a motion for preliminary injunction, but this issue did not arise because we could never foresee that that would be a problem.

THE COURT: I understand. Well, I'm only suggesting to you that you submit a form of proposed decree and when—I don't want to take up too much of your time on [235] it, we will discuss that when you are through with your arguments, and we will also talk to the Government counsel about the same thing.

MR. GILDIN: Thank you.

With respect to the issue of the objection being something that can't be cured at all because the computers will continue to be used, the Government misapprehends what Mr. Roy's objection and Miss Miller's objection is, and that is that if the unique number is used in this computer, the evil may be done.

But recall, Your Honor, the naming of Little Bird of the Snow at the ceremony out with the burial of the placenta, and the name being sacred and which can protect her from these evils, and which will continue to protect her even if that name is put in those computers. And they—

THE COURT: What did he say? I'm not clear as to the appearance of this goshawk.

When they were finished praying, after they buried the palcenta in the snow, or in the ground under the snow, how did this bird appear? What is in the air, did it come from the snow or what? What was the testimony?

MR. GILDIN: It rose out of the ground, Your Honor, and thus the name Little Bird of the Snow.

THE COURT: Okay.

MR. GILDIN: The name that is sacred and with the [236] power to protect her even against the Government's computers.

THE COURT: Well, was it said to be a small bird or is the child's name Little, Bird of the Snow? I'm not clear on that, either.

MR. GILDIN: It was a small goshawk, Your Honor, and thus the name, Little Bird of the Snow.

THE COURT: All right.

MR. GILDIN: The notion in terms of the Government's burden of, can our purposes be fulfilled, Mr. Hirt concedes that under this situation as it appears now, no problem, but should we take the Plaintiffs at their word.

Your Honor, we don't ask you to take the Plaintiffs at their word. The system works to prevent any future fraud, the way it is working right now. The computers can use that name Little Bird of the Snow Roy. Mr. Chamberlin testified yes, it's easy to get information from banks with respect to names. The Type 3 errors that are discussed, have no effect on the ability of the computer to work without that social security number. So, all of the functions, and we have heard no testimony to the contrary, all of the various matches; all of the various verifications may be done without the use of Little Bird of the Snow Roy's social security number.

Your Honor asked Mr. Hirt, well, what is the cost to the system and we have the same question. And it's their [227] burden of offering evidence, they have offered no evidence. Mr. Hirt concedes—

THE COURT: Go ahead with this idea and then conclude.

MR. GILDIN: Mr. Hirt concedes the system will not break down. We can't evaluate it and that's because there is no cost, Your Honor.

With respect to the issue of the injunctive relief, we would just reiterate as I have said just now, in addition to what we previously sought, we must ask that this Government be stopped from attempting to use this other number that is in their computer bank.

With respect to the issue of damages, Mr. Ressler again raised the Eleventh Amendment defense, Your Honor. His own trial brief at the bottom of Page 1, ... (Reading) Defendant Cohen is sued in his official capacity as Secretary of the Pennsylvania Department of Public Welfare, and in his individual capacity ... " (End of reading) As to the former, that is, as to the official capacity, the suit is barred by the Eleventh Amendment. Mr. Ressler concedes that that does not apply to the suit against him in his individual capacity. And with respect to—

THE COURT: Well, what about the respondeat superior point?

MR. GILDIN: Your Honor, there has to certainly be [238] personal involvement in the type of decision. But, the cases are very clear as to—as cited at least in our summary judgment motions and in our pre-trial memoranda. I believe, that the person is the policy maker, and the actions are taken pursuant to that policy, that is sufficient personal involvement to render one liable.

Your Honor, if the State and the Federal Government doesn't pay these retroactive benefits and damages, and the individual Defendants don't pay the retroactive benefits and damages, who pays, Your Honor? The loss falls entirely on the Roy family for benefits that everyone agrees they were entitled to. And what the Government says is that the entity can't pay, and then when you get down to the officials, they say, oh, we shouldn't be forced to pay. But what they are doing is playing a shell game which leaves the loss on the persons who least—are the least appropriate persons to bear it, the Roy family, particularly where no one disputes, at least with respect to the benefits, they were entitled to those very benefits.

Indeed, it would create and make sense for the Government to simply say, why should we pay, because you are going to have to come to Court, and you're going to have to sue us, and at the end of it all, while we may be ordered to pay you these benefits in the future, there is no sanction with respect to the benefits that were withheld, and it would [239] encourage the Government not to award benefits where they are entitled, where the recipients are entitled to them because there would be no cost for them to do so. And while Your Honor may consider it unfair that these individual policy makers pay, it's their policy which caused this loss. They do not share that entity immunity and therefore we respectfully request again that those damages issue.

Thank you.

THE COURT: All right. Now, we will ask counsel for both sides to submit a form of proposed order. As far as the Plaintiffs are concerned, I'm sure that they will submit two in the alternative: one, a preliminary injunctive order; and two, a final order, final injunctive order. And the Defendants ought to submit a proposed order. I don't know what

the form of it would be, but of course, it hasn't got anything to do with an injunction, but that would be helpful.

Now, when can we reasonably have something like that? Would you say within a week or ten days, is that all right with Plaintiffs' counsel?

MR. GILDIN: More than enough time, Your Honor. We will try to prepare that order tomorrow and put it in the mail because of the desire to preserve, if appropriate, the preliminary injunctive relief.

THE COURT: All right. How much time do the Defendants need? They sometimes have greater typing problems [240]than private counsel.

MR. HIRT: Well, Your Honor, I would hope to get something out of my office by Friday.

THE COURT: All right. What about you, Mr. Ressler, Will you join—

MR. RESSLER: Yes, Your Honor.

THE COURT: —and get one sent in, one document in from the defense, is that fair enough?

MR. RESSLER: Yes, Your Honor, that is what I intended to do.

THE COURT: All right. Well, I think maybe in view of your travel plans, you ought to tell Mr. Hirt what you have in mind and then he can draft it.

MR. RESSLER: I will do that.

THE COURT: If you can get it into our hands within a week, that will be fine, Mr. Hirt.

MR. HIRT: Fine, Your Honor.

THE COURT: All right. Now, it's five minutes after four and you have got ample time, I believe, to make your plane.

This Court is adjourned. Thank you.

(Whereupon, 4:05 p.m., Court adjourned.)

[241]

INDEX TO WITNESSES

For Plaintiff:	*Direct*	*Cross*	*Redirect*	*Recross*
Stephen Roy	137			
by Mr. Rossiter		146		
by Mr. Hirt		149		

INDEX TO CLOSING ARGUMENTS

Mr. Giblin ..... page 159
Mr. Hirt ..... page 196
Mr. Rossiter ..... page 221
Mr. Giblin (in rebuttal) ..... page 230

Supreme Court of the United States

No. 84-280

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

STEPHEN KEY, ET AL.

APPEAL from the United States District Court for the Middle District of Pennsylvania. The statement of jurisdiction having been submitted and considered by the Court, in this case probable jurisdiction is noted. The case is set for oral argument in tandem with No. 84-1097, *Goldman v. Weinberger*

Supreme Court, U.S.
FILED
AUG 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-780

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

STEPHEN J. ROY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF FOR THE APPELLANTS

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

KATHRYN A. OBERLY
Assistant to the Solicitor General

PETER R. MAIER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether 7 U.S.C. 2025(e) and 42 U.S.C. 602(a)(25), which require all applicants for and recipients of benefits under the Food Stamp and Aid to Families with Dependent Children programs to provide their state welfare agencies with their social security numbers, violate the Free Exercise Clause of the First Amendment as applied to persons who hold a sincere religious belief that social security numbers are part of a "great evil" that should be avoided.

PARTIES TO THE PROCEEDING

In addition to appellant Heckler, the defendants named in the district court were John R. Block, Secretary of Agriculture, and Walter Cohen, Secretary of the Pennsylvania Department of Public Welfare. Secretary Block is an appellant in this Court, and Secretary Cohen is an appellee appearing in support of the appellants.

In addition to appellee Roy, Karen Miller was a plaintiff in the district court and is an appellee in this Court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	3
A. Appellees' challenge to the SSN requirement	4
B. The role of SSNs in the administration of the AFDC and Food Stamp programs	8
C. The importance of SSNs in the administration of government programs generally	13
D. The district court's decision	17
Summary of argument	20
Argument:	
The SSN requirement serves a compelling governmental interest that cannot be achieved through any less burdensome means	27
A. The availability of alternatives to the SSN requirement should be evaluated on the basis of the programmatic governmental interests furthered by that requirement rather than the cost of granting exemptions to one or a handful of individuals	27
B. The government's compelling interest in the effective and efficient functioning of its welfare programs cannot be satisfied if appellees are exempted from the SSN requirement	41
C. The Free Exercise Clause does not prevent the government from assigning and using SSNs in the case of AFDC and Food Stamp applicants who decline to furnish SSNs themselves	44
Conclusion	47

TABLE OF AUTHORITIES

Cases: Page

Adderley v. *Florida*, 385 U.S. 39 37
Arthur v. *Washington State Dep't of Social & Health Services*, 19 Wash. App. 542, 576 P.2d 921 43
Atwood v. *Idaho Dep't of Health & Welfare*, No. 83-3066 (D. Idaho filed May 23, 1983) 29
Autenrieth v. *Cullen*, 418 F.2d 586, cert. denied, 397 U.S. 1036 31
Bob Jones University v. *United States*, 461 U.S. 574 ..... 21, 28
Braunfeld v. *Brown*, 366 U.S. 599 ..... 22, 33, 34, 35, 39, 40
Callahan v. *Woods*, 736 F.2d 1269 29
Cantwell v. *Connecticut*, 310 U.S. 296 45
Clark v. *Community for Creative Non-Violence*, No. 82-1998 (June 29, 1984) 22, 36
Cox v. *New Hampshire*, 312 U.S. 569 37
Heckler v. *Campbell*, 461 U.S. 458 13
Heffron v. *Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640 ..... 22, 36, 37
Lull v. *Commissioner*, 602 F.2d 1166, cert. denied, 444 U.S. 1014 31
Lynch v. *Donnelly*, No. 82-1256 (Mar. 5, 1984) 45
McDaniel v. *Paty*, 435 U.S. 618 45
McElrath v. *Califano*, 615 F.2d 434 42
Mullaney v. *Woods*, 97 Cal. App. 3d 710, 158 Cal. Rptr. 902 29
Pierce v. *Society of Sisters*, 268 U.S. 510 41
Prince v. *Massachusetts*, 321 U.S. 158 ..... 22, 33, 34
Regan v. *Time, Inc.*, No. 82-729 (July 3, 1984) 22, 36
Reynolds v. *United States*, 98 U.S. 145 45
Schweiker v. *Hansen*, 450 U.S. 785 42
Schweiker v. *McClure*, 456 U.S. 188 13
Sherbert v. *Verner*, 374 U.S. 398 ..... 23, 37, 38, 40, 41
Stevens v. *Berger*, 428 F. Supp. 896 29
Thomas v. *Review Board*, 450 U.S. 707 ..... 23, 37, 38, 40, 41
United States v. *Lee*, 455 U.S. 252 ..... passim
United States Postal Service v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 36

Cases—Continued: Page

Valley Forge Christian College v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 46
Walz v. *Tax Comm'n*, 397 U.S. 664 38
Wisconsin v. *Yoder*, 406 U.S. 205..24, 25, 37, 38, 40, 41, 43

Constitution, statutes and regulations:

U.S. Const. Amend. I (Free Exercise Clause) ..... *passim*
Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 *et seq.* 2
§ 2651, 98 Stat. 1147-1152 16
§ 2651(a), 98 Stat. 1147-1149 ..... 2, 3, 16
§ 2651(b)(1), 98 Stat. 1149 2
Food Stamp Act of 1977, 7 U.S.C. 2011 *et seq.* 8
7 U.S.C. 2011 8
7 U.S.C. 2014 8
7 U.S.C. 2020(e)(16) 9
7 U.S.C. 2025(a)-(d) 12
7 U.S.C. 2025(d)(2) 12
7 U.S.C. 2025(e) 3, 9, 39
7 U.S.C. (Supp. IV 1980) 2025(f) 39
7 U.S.C. 2025(g) 13
Internal Revenue Code of 1954 (26 U.S.C.):
26 U.S.C. 1402(g) 39
26 U.S.C. 3304 3
26 U.S.C. 6109(a)(1) 14
26 U.S.C. 6109(d) 14
Social Security Act, 42 U.S.C. 301 *et seq.*:
Tit. II, 42 U.S.C. 401 *et seq.*:
42 U.S.C. 405(c)(2)(B)(i) 15
42 U.S.C. 405(c)(2)(B)(i)(II) 46
42 U.S.C. 405(c)(2)(C)(i) 15
Tit. IV, 42 U.S.C. 601 *et seq.* 8
42 U.S.C. 601 8
42 U.S.C. 602(a)(7) 8
42 U.S.C. 602(a)(18) 8
42 U.S.C. 602(a)(25) 2, 3, 9
42 U.S.C. 602(a)(30) 13

Constitution, statutes and regulations—Continued: Page

42 U.S.C. 603(a)(3)(B) 13
42 U.S.C. 603(i) 12
18 U.S.C. 842(f) 14
22 U.S.C. (Supp. I) 2671(d)(1) 14
42 U.S.C. 1396a(a)(10)(A) 10
42 U.S.C. 1758(d)(2)(B) 9
Exec. Order No. 9397, 3 C.F.R. 57 (Supp. 1943) 13, 46
7 C.F.R. 273.10(f) 8
45 C.F.R. 206.10(a)(9)(iii) 8

Miscellaneous:

50 Fed. Reg. (1985):
pp. 10450 *et seq.* 16
p. 10451 16
H.R. Conf. Rep. 98-861, 98th Cong., 2d Sess. (1984) 16
H.R. Rep. 97-106, 97th Cong., 1st Sess. (1981) 9
Office of Operational Policy & Procedures, Social Security Administration, U.S. Dep't of Health & Human Services, *SSA Pub. No. 68-0100202, Social Security Number Applications* (1984) 46
Oversight of the Food Stamp Program: Hearings Before the Senate Comm. on Agriculture, Nutrition & Forestry, 98th Cong., 2d Sess. (1984) .. 11
S. Rep. 93-1356, 93d Cong., 2d Sess. (1974) 9
7 The President's Private Sector Survey on Cost Control (1984):
Management Office Selected Issues, Information Gap in the Federal Government 39
Report on Federal Feeding 39

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-780

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

STEPHEN J. ROY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the district court (J.S. App. 1a-23a) is reported at 590 F. Supp. 600. A prior opinion of the district court (J.S. App. 27a-35a) is unreported.

JURISDICTION

The judgment of the district court (J.S. App. 26a) was entered on June 22, 1984. The appellants filed a notice of appeal to this Court on July 18, 1984 (J.S. App. 37a). On September 11, 1984, Justice Brennan extended the time within which to docket this appeal to and including November 15, 1984. The jurisdictional statement was filed on November 13, 1984, and this Court noted probable jurisdiction on June 17, 1985 (J.A. 528). The jurisdiction of this Court is invoked under

28 U.S.C. 1252. See *United States* v. *Lee*, 455 U.S. 252, 256 n.5 (1982).

STATUTORY PROVISIONS INVOLVED

At the time of the district court's decision in this case, Section 402(a)(25) of the Social Security Act, 42 U.S.C. 602(a)(25), provided:

> A State plan for aid and services to needy families with children must * * * (25) provide (A) that, as a condition of eligibility under the plan, each applicant for or recipient of aid shall furnish to the State agency his social security account number (or numbers, if he has more than one such number), and (B) that such State agency shall utilize such account numbers, in addition to any other means of identification it may determine to employ in the administration of such plan.[1]

---

[1] The Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 *et seq.*, was signed into law on July 18, 1984. Section 2651(b)(1) of that legislation amended Section 402(a)(25) of the Social Security Act to read as follows (98 Stat. 1149):

> (25) provide that information is requested and exchanged for purposes of income and eligibility verification in accordance with a State system which meets the requirements of section 1137 of this Act[.]

Section 2651(a) of the Deficit Reduction Act of 1984 (98 Stat. 1147), in turn added a new section (Section 1137) to the Social Security Act that establishes detailed requirements for the income and verification systems that states must use in administering various federal welfare programs. Section 1137(a)(1) of the Social Security Act now provides (98 Stat. 1147) that:

> [T]he State shall require, as a condition of eligibility for benefits under any program listed in subsection (b), that each applicant for or recipient of benefits under that program furnish to the State his social security account number (or numbers, if he has more than one such number), and the State shall utilize such account numbers in the administration of that program so as to enable the association of the records pertaining to the applicant or recipient with his account number[.]

The programs included in the expanded income and eligibility verification system established by the Deficit Reduction Act of 1984

Section 16(e) of the Food Stamp Act of 1977, 7 U.S.C. 2025(e), provides in pertinent part:

> The Secretary [of Agriculture] and State agencies shall (1) require, as a condition of eligibility for participation in the food stamp program, that each household member furnish to the State agency their social security account number (or numbers, if they have more than one number), and (2) use such account numbers in the administration of the food stamp program.

STATEMENT

Appellees Stephen J. Roy and Karen Miller refused to comply with the requirement, contained in 42 U.S.C. 602(a)(25) and 7 U.S.C. 2025(e), that participants in two federal-state programs, the Aid to Families with Dependent Children program and the Food Stamp program, furnish their state welfare agencies with the social security numbers (SSNs) of the members of their household as a condition of receiving program benefits. Appellees contended that compliance with the SSN requirement as applied to their three-year old daughter, Little Bird of the Snow, would violate their religious beliefs and constitute an impermissible burden on their First Amendment right to exercise their religion freely. Because appellees refused to comply with the statutory requirement that they provide an SSN for Little Bird of the Snow, the Pennsylvania Department of Public Welfare terminated AFDC and medical assistance benefits payable to appellees on Little Bird of the Snow's behalf and instituted proceedings to reduce the level of food stamps that appellees' household was receiving. Appellees then commenced this action against the Secretary of the

---

are the Aid to Families with Dependent Children program, the Medicaid program, the unemployment compensation program of Section 3304 of the Internal Revenue Code of 1954 (26 U.S.C.), the Food Stamp program, and any state program under a plan approved under Titles I, X, XIV, or XVI of the Social Security Act. Pub. L. No. 98-369, § 2651(a), 98 Stat. 1148-1149.

Pennsylvania Department of Public Welfare, the Secretary of Health and Human Services, and the Secretary of Agriculture, challenging the constitutionality of the SSN requirement as applied to themselves. The district court held that the SSN requirement is unconstitutional as applied to appellee Roy and enjoined the state and federal defendants from denying program benefits to appellees on account of their failure to provide an SSN for Little Bird of the Snow. The court also enjoined Secretary Heckler from "using or disseminating" the SSN already assigned to Little Bird of the Snow in response to an application made by her mother, appellee Miller, shortly after Little Bird of the Snow's birth.

At trial, appellees introduced evidence concerning Roy's religious beliefs, and the government introduced evidence explaining the purpose of the SSN requirement in the administration of the AFDC and Food Stamp programs. That evidence may be summarized as follows.

A. Appellees' Challenge To The SSN Requirement

Appellee Roy is a Native American descended from the Abenaki Tribe.[3] Roy testified that he derives his religious beliefs "[p]artly from intuition, partly from hearing other Abenakis speak, partly from what [he] read about religious teachings" (J.A. 72; see also J.A. 76). The central tenet of Roy's beliefs appears to be the legend of Katahdin, which is about the "great evil." The "great evil" consists of three separate but related "evils." The first evil is the widespread use of computers, the second evil is society's casual acceptance of the widespread use of computers, and the third evil is the proliferation of weaponry that increasingly employs

---

[3] Although appellee Miller is not an Indian by blood and did not testify at trial, she apparently shares Roy's Native American religious beliefs (J.A. 18). Because of Miller's failure to offer any proof regarding her religious beliefs, the government moved to have her dismissed as a plaintiff, but the district court denied the motion (J.A. 190-198).

computer technology, thereby making the use of the weapons to kill people a "sterile" act. J.S. App. 4a. The legend of Katahdin is "ancient," predating the arrival of the white man. It does not deal specifically with nuclear energy or computers, but Roy's "intuition" tells him that the legend would be concerned about computers and nuclear weapons. J.A. 126-127.

Roy considers social security numbers to be part of the "great evil," apparently because they are "used by the computers" and therefore rob people's spirits in a manner similar to what psychologists might call "dehumanization" (J.A. 87). In addition, Roy believes that the evil of SSNs is related to their function as unique personal identifiers. He testified that an SSN would be used to rob Little Bird of the Snow "of her ability to have greater power in that this number is a unique number. • • • It's applied to her and only her; and being applied to her, that's what offends us, and we try to keep her person unique, and we try to keep her spirit unique, and we're scared that if we were to use this number, she would lose control of that and she would have no ability to protect herself from any evil that that number might be used against her" (J.A. 85; see also J.A. 108-109).

Although the case was tried on the assumption that Little Bird of the Snow did not have an SSN and that it would violate Roy's religious beliefs to obtain one for her, it was learned on the last day of trial that she does have one.[5] Her mother, appellee Miller, applied for Little Bird of the Snow's SSN when the child was born, apparently without Roy's knowledge. When Roy received Little Bird of the Snow's social security card in the mail, he and Miller allegedly returned it to the Social Security Administration and asked that it be "revoked."

---

[5] Roy was asked whether he ever told his attorney that Little Bird of the Snow already had an SSN. Roy stated that he had but seemed to be unsure whether the attorney was paying attention during their consultation. J.A. 472.

Roy testified that the Social Security Administration advised him in writing that Little Bird of the Snow's SSN would remain "dormant," but Roy did not produce any correspondence to support his testimony. J.A. 464-467, 471.

Roy himself uses a social security number, as does Miller and their older daughter, Renee. Roy does not object to providing SSN's for himself, Miller, and Renee because all three acquired their numbers before Roy came to hold his current religious beliefs and therefore the spirits of all three have been sufficiently robbed that they can no longer be prepared for greater power. J.A. 88, 110. With respect to Little Bird of the Snow, on the other hand, Roy believes that he can still prepare her for greater power and that her spirit has not yet been robbed by overuse of the SSN she acquired shortly after her birth. Roy believes that Little Bird of the Snow must decide for herself whether she wishes to use an SSN, but he does not know when she will be ready to make that decision or when he will discuss the matter with her. J.A. 90, 114-115, 120, 123-124.

Roy testified that he objects not to all numbers (but see page 7, *infra*) but just to "the manner [in which the SSN] is used because it represents a great evil to us" (J.A. 86). Roy has no specific religious objection to receiving numbered food stamps or numbered AFDC checks (J.A. 94). On the other hand, Roy testified that he would be upset "[t]o some degree" by the use of *any* sort of information that identified himself and his family as individuals (J.A. 112). He also testified that he might be "a little" upset if he were to learn that the state welfare department uses a unique case number to identify Little Bird of the Snow (J.A. 116).

During the course of trial, Roy was asked about various alternatives to the use of an SSN for Little Bird of the Snow. The district judge explained his system of converting numbers into words as a device to remember telephone numbers; for example, the district judge

remembers the telephone number of the Chief Judge of the District by calling him "Phillippino Overpot." J.A. 129. Using this system, the judge asked Roy whether he would object to Little Bird of the Snow's being given the number 515-94-1802 as her SSN, which represented the judge's conversion of Little Bird of the Snow's name into a nine-digit number.[4] Although he saw "a lot of good" in the suggestion, Roy rejected this alternative because the special number still would apply uniquely to Little Bird of the Snow. In addition, Roy felt that Little Bird of the Snow would have to have some say in the decision to accept or reject the judge's suggestion, but she is currently incapable of making such a decision. J.A. 468-469.

Roy also was unwilling to select any other SSN from a group of numbers that the government could make available, and he testified that he would object to any other system of unique numerical identifiers (J.A. 115-116). The only alternatives acceptable to Roy were the use of his own SSN for Little Bird of the Snow or the use of her name alone (J.A. 45-46, 93). Roy did not believe that the use of his SSN for Little Bird of the Snow would harm her because the number would not be unique to her (J.A. 93), and he did not object to the use of her name alone because he believes that her name would protect her from any evil that might other-

---

[4] A government witness testified that the number 515-94-1802 has not been assigned to anyone else and that the Social Security Administration occasionally assigns special numbers upon request. The witness did note that the number created by the judge, because of its first three digits, would normally be assigned to someone in Kansas rather than Pennsylvania, and that even in Kansas the number was approximately 30,000 numbers ahead of numbers then being issued. Because computers are programmed to reject "impossible" account numbers, some sort of computer modification would have to be made so that the number 515-94-1802 would not be rejected. J.A. 402-403. There is nothing in the record to suggest that the government would not have made the necessary modification had the judge's proposal been acceptable to Roy.

wise befall her while her records were being processed through a computer system (J.A. 94).

B. The Role Of SSNs In The Administration Of The AFDC And Food Stamp Programs

The AFDC program, established by Title IV of the Social Security Act, 42 U.S.C. 601 *et seq.*, is a jointly-funded federal-state program. Its purpose is to encourage "the care of dependent children in their own homes or in the homes of relatives" by providing funds for the support of such children. 42 U.S.C. 601. Eligibility for the program is based on financial need. Dependent children and their parents or other caretaker relatives are eligible for a grant if their income and resources are less than a set minimum subsistence level. 42 U.S.C. 602(a)(7) and (18).

The purpose of the Food Stamp program, as established in the Food Stamp Act of 1977, 7 U.S.C. 2011 *et seq.*, is to "permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation." 7 U.S.C. 2011. The Food Stamp program is jointly administered by the state and federal governments. As is the case under the AFDC program, eligibility for the Food Stamp program is based on financial need. 7 U.S.C. 2014.

In order to receive benefits under either program, therefore, a household must establish its financial eligibility; continued eligibility for the AFDC program is redetermined at least once every six months (45 C.F.R. 206.10(a)(9)(iii)), and households participating in the Food Stamp program must be recertified at intervals ranging from one month to a maximum of 12 months (7 C.F.R. 273.10(f)).[9] To make possible the verification

---

[9] Periodic redeterminations of eligibility are required because benefits, based as they are on financial need, must be adjusted, up or down, to take account of recipients' constantly changing eco-

and periodic reverification of income, resources, and other eligibility factors, and to aid in the detection of fraud, Congress has required benefit applicants and recipients to furnish the administering state agencies with the SSNs of each member of their household. 7 U.S.C. 2025(e); 42 U.S.C. 602(a)(25); see S. Rep. 93-1356, 93d Cong., 2d Sess. 49 (1974); H.R. Rep. 97-106, 97th Cong., 1st Sess. 58, 60 (1981). Congress has not chosen to require benefit applicants and recipients to furnish any other self-identifying information to their state welfare agencies; although state agencies commonly request additional information, the SSN requirement is the only information mandated by federal statute.[6]

As the record in this case reflects, the AFDC and Food Stamp programs are truly massive. In fiscal year 1981, an average of nearly four million families received AFDC payments each month. J.A. 26. These families included more than 11 million persons, of whom 7½ million were children. *Ibid.* In that same year, the federal government spent nearly $8 billion to fund AFDC programs in the states and other United States jurisdictions. *Ibid.* Similarly, in fiscal year 1982, an average of approximately 20 million persons received food stamps each month, at a cost to the federal government of approximately $11 billion. J.A. 34.[7]

---

nomic circumstances. In addition, changes in family structure, such as separation or divorce, or removal of a child from the family, also affect welfare eligibility.

[6] Congress has authorized the use of photographic identification cards in the administration of the Food Stamp program. 7 U.S.C. 2020(e)(16). Congress has not made the use of such cards mandatory, however, choosing instead to leave the matter to the discretion of the Secretary of Agriculture. *Ibid.*

[7] It is also significant that a household determined to be eligible for the Food Stamp program is automatically entitled to participate in six other benefit programs administered by the Department of Agriculture without further demonstration of eligibility. See J.A. 35; 42 U.S.C. 1758(d)(2)(B). The federal government expended

Requiring all applicants and recipients to provide SSNs serves a multitude of discrete purposes. First, the magnitude of programs such as AFDC and Food Stamps requires computerized systems for the management of data concerning benefit applicants and recipients. The SSN requirement has become particularly important as states move toward centralized administration of numerous welfare programs. As the record reflects, effective centralization and computerization of state welfare systems requires the assignment of a unique numerical identifier to all applicants and recipients; in programs of this size, moreover, all persons must have the same type of number. J.A. 30.

Second, the SSN requirement enables state welfare agencies to verify applicants' resources and income quickly and reliably, and thus to ensure that a family's grant is set at the correct level. J.A. 26-27, 35-36. In this connection, the statutory SSN requirement is necessary in order to ascertain whether AFDC applicants are receiving other federal benefits that would render them ineligible for AFDC benefits or require a reduction in the level of AFDC benefits provided. J.A. 199-200, 215-216. Obtaining applicants' SSNs is particularly necessary for the verification of income and resources because the records systems of other governmental entities and private entities that state welfare agencies consult for verification purposes utilize SSNs for identification. For example, many private and public institutions, including banks, businesses, hospitals, schools, and state and local service agencies, maintain their records based upon SSN identification. J.A. 203-204, 212-213, 342-345, 360.

$3.8 billion in benefits under these programs in fiscal year 1982 (J.A. 35). Thus, a household certified as eligible for food stamps, even on the basis of erroneous or incomplete information, may also obtain improper access to those additional benefit programs. Similarly, states are required to make Medicaid coverage available to all AFDC recipients, based solely on the determination that they are eligible for AFDC benefits. See 42 U.S.C. 1396a(a)(10)(A).

Finally, the SSN requirement is an essential tool in the government's efforts to combat welfare fraud and waste. The Department of Agriculture estimates that, in fiscal year 1981, $1 billion in food stamp benefits was attributable to persons ineligible for the program or to overpayments to eligible individuals. See *Oversight of the Food Stamp Program: Hearings Before the Senate Comm. on Agriculture, Nutrition & Forestry*, 98th Cong., 2d Sess. 255 (1984). The SSN requirement addresses this problem at least in part by enabling the government to verify income and resources, to guard against duplicate payments, and to keep track of persons no longer entitled to receive food stamps because of past abuses of the program. J.A. 343-344.

To deal with the problems of fraud and waste, the federal and state governments have increasingly relied on computer "matching" techniques employing SSNs. For example, upon learning of reports that many federal and military employees were receiving AFDC benefits, the Inspector General of the Department of Health and Human Services launched "Project Match" in 1977 to cross-check federal military and civilian employee rolls against state AFDC rolls. Initially, 26 states submitted computer tapes for this match, and 33,000 apparent matches were forwarded to the federal agencies for submission of payroll data. Approximately 33% of these cases were found to be overpaid or ineligible for benefits. Interjurisdictional matches were also undertaken in 1977 to compare records from participating states in search of instances in which individuals might be drawing grants from two or more jurisdictions. Out of the initial 26 states that were "matched" in 1977, 9,000 individuals were identified as receiving duplicate welfare payments. A second interjurisdictional match of all 50 states identified an additional 8,000 such individuals. The Inspector General of HHS estimated savings of $7.9 million in reduced and terminated AFDC payments in the first year following the federal employee and inter-

jurisdictional matches. J.A. 27-28. Interjurisdictional matches have continued in subsequent years, and each year's match uncovers more fraud and abuse. J.A. 28. Interjurisdictional matches cannot be performed without SSNs because SSNs are the only common element in the data systems of the various states. J.A. 208-211, 222-223, 230-231.[8]

SSNs are required for all members of a household, including children, because the various data banks that are consulted to verify eligibility and detect fraud may contain information about each member of a household. For example, children may have bank accounts in their own names, and their unearned interest income must be considered in determining a household's total income and resources. If the SSNs of only the parents were required, such information would go undetected. In addition, it is not uncommon for children to be improperly claimed as dependents by more than one household. Without an SSN requirement applicable to children, therefore, state welfare agencies would be unable to detect improper payments or cases in which benefits are sought on behalf of nonexistent children. J.A. 223-225, 347-348.[9]

---

[8] Although certain types of intrastate matches may be performed without SSNs, even the reliability of those matches is significantly less than matches performed with SSNs. Duplication of names, misspellings, variations in the manner in which non-numerical data is entered into computers, and various other factors all combine to reduce the effectiveness of any system of cross-checking that does not employ SSNs. J.A. 219-222, 227-228, 346.

[9] State governments have a particularly strong incentive to employ SSNs in the administration of these programs because they are under a congressional mandate to reduce their payment error rates. 7 U.S.C. 2025(d)(2); 42 U.S.C. 603(i). Moreover, the federal government reduces the level of reimbursement to the states when their payment error rates exceed a certain level. 7 U.S.C. 2025(a)-(d); 42 U.S.C. 603(i). On the other hand, the federal government provides states with an incentive to improve the reliability of their programs by agreeing to pay a higher portion of the administrative costs incurred by a state in setting up a system

C. The Importance Of SSNs In The Administration Of Government Programs Generally

Although this case involves the SSN requirement only as it applies to the AFDC and Food Stamp programs, it is important to appreciate the central role that SSNs play in the administration of a wide variety of government programs. At the outset, we recognize that it is precisely the widespread use of SSNs that is disturbing to appellees; at the same time, however, the Court cannot ignore the fact that, as our society becomes increasingly complex, and as citizens (such as appellees) increasingly call upon the government to provide benefits and services, the government cannot function in the simplified manner that appellees have chosen for their own personal lifestyle. Cf. *Heckler* v. *Campbell*, 461 U.S. 458, 461 n.2 (1983); *Schweiker* v. *McClure*, 456 U.S. 188, 198 n.13 (1982).

Government-wide use of the SSN began in 1943, when President Roosevelt issued Executive Order No. 9397, 3 C.F.R. 57 (Supp. 1943). In pertinent part, that Order provided:

> WHEREAS certain Federal agencies from time to time require in the administration of their activities a system of numerical identification of accounts of individual persons; and
>
> WHEREAS some seventy million persons have heretofore been assigned account numbers pursuant to the Social Security Act; and
>
> • • • • •
>
> WHEREAS it is desirable in the interest of economy and orderly administration that the Federal Government move towards the use of a single, un-

---

that meets various federal standards, including such elements as cross-matching the income reports of welfare applicants and recipients against records of the Social Security Administration, state income tax records, vital statistics bureaus, and motor vehicle registrations. 7 U.S.C. 2025(g); 42 U.S.C. 602(a)(30) and 603(a)(3)(B). See also J.A. 197-199, 353-356.

duplicated numerical identification system of accounts and avoid the unnecessary establishment of additional systems;

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, it is hereby ordered as follows:

1. Hereafter any Federal department, establishment, or agency shall, whenever the head thereof finds it advisable to establish a new system of permanent account numbers pertaining to individual persons, utilize exclusively the Social Security Act account numbers assigned pursuant to Title 26, section 402.502 of the 1940 Supplement to the Code of Federal Regulations and pursuant to paragraph 2 of this order.

2. The Social Security Board shall provide for the assignment of an account number to each person who is required by any Federal agency to have such a number but who has not previously been assigned such number by the Board. The Board may accomplish this purpose by (a) assigning such numbers to individual persons, (b) assigning blocks of numbers to Federal agencies for reassignment to individual persons, or (c) making such other arrangements for the assignment of numbers as it may deem appropriate.

Over the past 40 years, Congress and numerous federal agencies have recognized the necessity of SSNs for the administration of a myriad of programs in which accurate identification of individuals is important. See, *e.g.*, 18 U.S.C. 842(f) (the Secretary of the Treasury must be provided with the social security number of any person to whom explosive materials are distributed); 22 U.S.C. (Supp. I) 2671(d)(1) (the Secretary of State shall require borrowers under the repatriation loan program to provide their social security number); 26 U.S.C. 6109(d) ("The social security account number issued to an individual * * * shall * * * be used as the identifying number for such individual for purposes of [the Internal Revenue Code]."); 26 U.S.C. 6109(a)(1) (SSNs

must be used as the identification number by any person required to file a tax return or other document under the Internal Revenue Code). Particularly sweeping are the provisions of the Social Security Act itself; of special relevance to this case is 42 U.S.C. 405(c)(2)(B)(i), which provides in pertinent part as follows:

> [T]he Secretary [of Health and Human Services] shall take affirmative measures to assure that social security account numbers will, to the maximum extent practicable, be assigned to all members of appropriate groups or categories of individuals by assigning such numbers • • •:
>
> • • • • •
>
> (II) to any individual who is an applicant for or recipient of benefits under any program financed in whole or in part from Federal funds including any child on whose behalf such benefits are claimed by another person • • •.

Equally significant is 42 U.S.C. 405(c)(2)(C)(i), which expresses a congressional policy that carries forward and expands upon the policy initially adopted by President Roosevelt:

> It is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction, utilize the social security account numbers issued by the Secretary [of Health and Human Services] for the purpose of establishing the identification of individuals affected by such law, and may require any individual who is or appears to be so affected to furnish to such State (or political subdivision thereof) • • • the social security account number • • • issued to him by the Secretary.

Most recently, Congress has expanded the role of SSNs in the administration of welfare programs by requiring state agencies administering the Unemployment

Compensation program, the Food Stamp program, the AFDC program, the adult assistance programs (Titles I, X, XIV and XVI of the Social Security Act), and the Medicaid program to develop comprehensive income and eligibility verification systems for those programs. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2651(a), 98 Stat. 1147. The first requirement imposed by Section 2651(a) is that benefit applicants and recipients must provide administering state agencies with their SSNs as a condition of program eligibility; the state agencies, in turn, are required to "utilize [SSNs] in the administration of [the covered programs] so as to enable the association of the records pertaining to the applicant or recipient with his account number." *Ibid.* The legislative history of this provision clearly demonstrates Congress's understanding of the centrality of standardized data, such as SSNs, to effective program administration (H.R. Conf. Rep. 98-861, 98th Cong., 2d Sess. 1411 (1984)):

> The income and eligibility system requires use of standardized data formats to facilitate exchange of information, for the purpose of identifying and reducing ineligibility and incorrect payments. The requirement for standardized formats is intended to assure easy exchange of information by progress within States, and to facilitate the exchange of information among States. This requirement does not require the use by States of identical systems, but only that each State must be able to provide certain essential eligibility data in a format which can be used by the agencies and jurisdictions with which data exchanges are made.[10]

---

[10] See also 50 Fed. Reg. 10450 *et seq.* (1985) (proposed rules implementing Section 2651 of the Deficit Reduction Act of 1984 (98 Stat. 1147-1152)). As the preamble to the proposed rules states (50 Fed. Reg. 10451 (1985)):

> The purpose of using available information to verify program participant eligibility is to improve the accuracy of program

As previously noted (see page 12, *supra*), SSNs are the only common data element shared by the various states. Moreover, the Social Security Administration currently maintains data on more than 383,000,000 accounts (J.A. 23). In dealing with numbers of this magnitude, the duplication of names makes a numerical system of identification essential to effective operation of countless government programs, including those at issue in this case. J.A. 32, 34.

D. The District Court's Decision

The district court issued an opinion (J.S. App. 1a-23a) holding that the SSN requirement is unconstitutional as applied to appellee Roy. The court first held that the case was not moot despite the surprise discovery on the last day of trial that Little Bird of the Snow has had an SSN since birth (see page 5, *supra*). The court reasoned (*id.* at 11a) that, while Roy would have preferred that no SSN had ever been established for Little Bird of the Snow, "Roy sincerely believes that the spirit of Little Bird of the Snow has not been robbed by the mere establishment of a social security number for her," and that Roy "further believes that no substantial harm will befall Little Bird of the Snow until her social security number is 'used'." Accordingly, the court concluded that appellees' desire to obtain welfare benefits without the government's using Little Bird of the Snow's SSN saved the case from mootness. *Id.* at 11a-12a.

The district court next concluded that Roy's beliefs concerning SSNs are religious in nature (J.S. App. 13a-

---

eligibility and benefit determination. In so doing the agencies will be able to improve program integrity by directing limited resources to those individuals who are legally eligible for program benefits. This improved program integrity will result in a general public and participant perception that the welfare programs are fair and equitable. Finally, when fully operational the income and eligibility verification procedures will aid in the reduction of the budget deficit.

14a) and that they are sincerely held (*id.* at 14a-15a).[11] At the same time, the court found that the government's interest in maintaining the SSN requirement is "substantial" and "great" (*id.* at 15a, 18a). (The court previously had issued an opinion on the parties' motions for summary judgment in which it found that the governmental interest is "compelling" (*id.* at 32a). The court did not alter that conclusion in its final opinion.) The court then stated that it would "consider this case under the reasonable less restrictive alternative standard" (*id.* at 18a); in other words, it would uphold the SSN requirement unless it were shown that the governmental interest could be served "by some reasonable less restrictive alternative" (*id.* at 32a).

Although the district court stated (J.S. App. 18a) that it would consider appellees' "interests as against the government's interest in this particular case as well as the government's interest in the social security number requirement as a general matter," in fact the court's analysis focused entirely on this particular case. Thus, in its case-specific analysis, the court held that the government's interest "in avoiding a grant of an exemption to the social security number requirement to the Plaintiffs in

---

[11] With respect to appellee Miller, the court stated (J.S. App. 14a-15a):

> [B]ecause she did not testify at the trial of this case, we are unable to determine whether she sincerely holds religious beliefs identical or similar to those held by Mr. Roy. Plaintiff Miller does not claim that she has been denied cash assistance for Little Bird of the Snow but she contests Defendants Block and Cohen's threatened termination of food stamps for Little Bird of the Snow. We are hesitant to grant Miller injunctive relief against the threatened termination of food stamps in light of her failure to testify at trial. Nevertheless, it would be inequitable to hold that Plaintiff Roy need not provide a social security number for Little Bird of the Snow while allowing the government to require Miller to provide a social security number for Little Bird of the Snow, thereby effectively denying Roy the relief he seeks.

this case is very small." *Id.* at 19a. The court summed up its conclusion as follows (*ibid.*):

> It appears to the Court that the harm that the Government might suffer if the Plaintiffs prevailed in this case would be, at worst, that one or perhaps a few individuals could fraudulently obtain welfare benefits. Such a result would obtain only if (1) Little Bird of the Snow attempted fraudulently to obtain welfare benefits or someone else attempted fraudulently to obtain such benefits using Little Bird of the Snow's name *and* (2) identification procedures available to the Defendants that do not require utilization of a social security number failed to expose the fraud. This possibility appears to the Court to be remote.

Despite its previously-stated intention to examine the case from two perspectives, the district court's programmatic analysis was not any different than its case-specific analysis. The court merely wrote that the government's *general* interest in maintaining the SSN requirement "does not appear to be threatened by the claim presented in this case *because the Plaintiffs' claim appears to be extremely unusual.*" *Id.* at 18a (emphasis added). At no point did the court consider the institutional harm caused by the need to recognize individual exceptions to the SSN requirement. Indeed, the court displayed an extremely cavalier attitude toward the very governmental interests that it had previously found compelling. Instead of determining whether those interests could be served equally well if Little Bird of the Snow were exempted from the SSN requirement, the court held, in essence, that a little inefficiency and even a little fraud were of no consequence because, when compared to the magnitude of the programs as a whole, the damage to the government's compelling interests would be small. See J.S. App. 19a-21a.

In view of these conclusions, the district court enjoined defendants from denying benefits to appellees for

Little Bird of the Snow because of appellees' failure to provide an SSN for Little Bird of the Snow (J.S. App. 21a). The court also enjoined Secretary Heckler from "using or disseminating" the SSN already assigned to Little Bird of the Snow (*id.* at 22a) and ordered the Secretary to "notify any agency, individual, business entity or other third party to which the number has been provided and demand that said agency permanently refrain from: (1) making any use of the number and (2) disseminating the number to any other agency, person, individual, business entity, or any other third party" (*id.* at 24a-25a). These injunctions are to remain in effect until Little Bird of the Snow's 16th birthday (*id.* at 22a). Finding that appellees have no current religious objection to the past establishment of an SSN for Little Bird of the Snow, the court denied their request that her SSN be "eliminated" (*id.* at 21a-22a).

SUMMARY OF ARGUMENT

I. The district court has invalidated as applied to appellees the requirement that applicants for and recipients of AFDC and food stamps to provide to their state welfare agencies a social security number for every household member who receives benefits. The invalidation of these provisions seriously jeopardizes the government's ability to combat fraud in federal welfare programs and generally to promote the administrative efficiency of such programs through the uniform application of a neutral rule of unquestionable rationality. We submit that the district court's ruling was based on a flawed premise—that the smaller the number of persons objecting to a neutral requirement on religious grounds, the greater their claim to an exemption from the requirement. The logical corollary to that premise is that government may refuse to accommodate religious beliefs so widely held that the administrative burden and programmatic impact of judicially-mandated exemptions would be too great. Such a result defies common sense.

A. This Court has ruled that when an individual's sincerely held religious beliefs conflict with the means chosen to accomplish a compelling governmental interest, and no less restrictive alternatives are available to achieve that interest, the government's programmatic concerns must prevail. *Bob Jones University* v. *United States*, 461 U.S. 574 (1983). In the present case, the district court concluded that Roy's religious beliefs are sincerely held, but it also found that the government has a compelling interest in using SSNs in its welfare programs. The disagreement between the parties thus turns on the proper application of the "least restrictive means" test.

In our view, the "least restrictive means" inquiry in Free Exercise cases should focus on the programmatic interests furthered by the statutory requirements at issue—in this case, verifying eligibility, preventing and detecting fraud, and promoting efficient administration of massive government programs. If the government can accomplish those objectives equally well by adopting a less burdensome alternative applicable to the populace as a whole, then it may be appropriate to require the government to offer that alternative to appellees. But if SSNs are essential to the accomplishment of Congress's general goals in the administration of federal welfare programs, then the government should not be obliged to rely on a less effective alternative simply because the granting of a handful of exemptions might be thought to work only a marginal interference with the legislative purposes. And certainly there is no support for the notion, implicit in the district court's analysis, that the government's compelling interests in this case must be subordinated to appellees' religious objection to the SSN requirement simply because a small amount of inefficiency and fraud would not bring about the collapse of the AFDC and Food Stamp programs.

This Court's decision in *United States* v. *Lee*, 455 U.S. 252 (1982), demonstrates the error of the district

court's analysis. There, the Court rejected the claim of an Amish employer for an exemption from paying social security taxes for his Amish employees. The Court did so despite the fact that an exemption limited to Amish employers would have done little if any damage to the integrity of the social security system, because the Amish not only oppose paying into the system but also oppose receiving benefits. Instead, the Court focused on the compelling governmental interest in *uniform* administration of the social security program and concluded that mandatory participation by *all* employers was essential to the achievement of Congress's purposes. So too, the earlier cases of *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), and *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), demonstrate the impropriety of ignoring a legislative determination that individualized exemptions would undermine the purposes behind a neutral law of general applicability. In both cases, the Court declined to grant individualized exemptions from the statutes at issue, even though there was no indication that a few such exemptions would have worked any serious interference with the overall legislative purposes.

B. The approach we advocate here parallels the Court's approach in numerous cases construing the First Amendment's protection of speech. Declining to focus on the number of persons who might assert a claim for special treatment, the Court instead has repeatedly looked to the consequences of wholesale exemptions in determining whether a particular plaintiff's claim to an exemption overrides the challenged government regulation. See, *e.g.*, *Regan* v. *Time, Inc.*, No. 82-729 (July 3, 1984), slip op. 16 n.12; *Clark* v. *Community for Creative Non-Violence*, No. 82-1998 (June 29, 1984), slip op. 8; *Heffron* v. *Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981). These cases are especially significant because, at the same time that the Court has focused on the programmatic effects of wholesale exemptions, it has not required the government to

show a substantial likelihood that large numbers of persons could be expected to claim similar exemptions. Here too, it is sufficient that the government would have no principled basis upon which to grant certain religiously-grounded claims for exemptions while denying others; it need not show that there are potentially vast numbers of such claims.

C. This case is distinguishable from *Thomas* v. *Review Board*, 450 U.S. 707 (1981), and *Sherbert* v. *Verner*, 374 U.S. 398 (1963), in which the Court held that states could not refuse to provide unemployment benefits to persons who had terminated their employment on religious grounds. The statutes at issue in those cases expressly required case-by-case substantive determinations of each individual's entitlement to unemployment compensation, whereas the federal statutes at issue here impose a purely mechanical requirement applicable to all who seek AFDC and Food Stamp benefits. Moreover, requiring states to pay unemployment benefits to workers who had terminated their employment on religious grounds did not interfere with the legislative purpose of ensuring that benefits were paid only to persons who had left their jobs for legitimate reasons. In this case, by contrast, Congress's overall goals of verifying program eligibility, preventing and detecting fraud, and administering massive government programs efficiently would be seriously jeopardized if the government must exempt certain people from the SSN requirement.

Thomas and *Sherbert* also raised issues of a fundamentally different nature than the instant case. In *Thomas* and *Sherbert*, the state statutes imposed a substantive condition on the right to unemployment benefits that operated so as to discriminate against the exercise of religious beliefs; religious objections to employment were treated differently from all other disabilities. Here, by contrast, no substantive requirement, religious or otherwise, operates to deny appellees AFDC and Food

Stamp benefits. Rather, what is at issue is merely an informational requirement used to establish a claimant's eligibility for benefits; the requirement has nothing to do with religion, and it is applied to all who seek benefits, without regard to religious considerations.

Finally, this case is distinguishable from *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), in which the Court held that Amish parents could not be compelled to comply with Wisconsin's compulsory school attendance law after their children had completed the eighth grade. Unlike the typical Free Exercise case, involving a clash between minority rights and societal interests, both the Amish parents in *Yoder* and the State shared a common interest in providing for the welfare of Amish children. It is therefore not surprising that the Court rejected the State's attempt, in its parens patriae capacity, to displace the fundamental role of parents in the religious and educational upbringing of their children, particularly in light of the unusually strong showing made by the Amish parents that their alternative mode of continuing education fully prepared their children for adult life (see 406 U.S. at 232). Furthermore, the substantive requirement at issue—forced attendance at school for one or two more years than the religious beliefs of the Amish permitted—was, under any mode of analysis, a significantly greater infringement on religious liberty than the purely informational requirement at issue in this case.

II. Even if the Court were to analyze this case on an individual, rather than a programmatic, basis, it is clear that the compelling governmental interests served by the SSN requirement cannot be satisfied if Little Bird of the Snow is exempted from that requirement. Congress intended to ensure that AFDC and Food Stamp benefits are provided only to the eligible needy, and it determined that the SSN requirement is essential to accomplish that purpose. Appellees' refusal to supply Little Bird of the

Snow's SSN clearly and directly frustrates the government's compelling interests. In practical effect, appellees insist on partaking of government benefits, but only on their own terms.

Moreover, appellees' suggested "less restrictive alternatives" to providing Little Bird of the Snow's SSN do not satisfy Congress's purposes. The use of appellee Roy's SSN to identify Little Bird of the Snow is inherently incompatible with the role of SSNs as unique *personal* identifiers. And the use of Little Bird of the Snow's name alone is simply not as reliable a method for computer cross-matching as the use of her SSN; indeed, in many instances the absence of an SSN makes cross-checking impossible. In any event, the constitutionality of the sole informational requirement that Congress has chosen to impose on welfare applicants and recipients cannot be made to depend on the uniqueness of a particular litigant's name.

The inadequacy of appellees' suggested alternatives provides yet another basis for distinguishing this case from *Wisconsin* v. *Yoder*, *supra*. In *Yoder*, the Court specifically noted that excusing Amish children from Wisconsin's compulsory education laws beyond the eighth grade in no way interfered with the State's admittedly strong interest in universal compulsory education (406 U.S. at 235-236). This was so because the Amish parents had carried the extremely "difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education" (*id.* at 235). Appellees' proffered alternatives, on the other hand, bear no relationship to the overall interests that the government seeks to promote through the SSN requirement.

Finally, it is significant that Roy's religious beliefs cannot be fully accommodated by *any* alternative that the government might adopt. Although the focus of this litigation has been on the SSN requirement, the record also reflects that Roy objects, on religious grounds, to the use

of *any* information that would identify himself and his family as individuals, and he objects to any system of numerical identification. Yet even if Little Bird of the Snow were to be exempted from the SSN requirement, she still would be subject to some separate system of numerical identification, if only for the purpose of ensuring that she receives the benefits she seeks. Administering programs the size of the AFDC and Food Stamp programs unavoidably requires the use of computers, and the management of computerized data on such a large scale requires the assignment of unique numerical identifiers. The government should not be required to devise a separate system for appellees when that system, whatever it might be, necessarily would entail virtually the same "evils" that prompted this litigation in the first place.

III. The district court's injunction is in any event overbroad. The court cited no tenable basis for enjoining Secretary Heckler from "using or disseminating" Little Bird of the Snow's SSN and directing the Secretary to demand that all other entities, governmental and private, cease using Little Bird of the Snow's SSN. Even under the most expansive interpretation, the Free Exercise Clause only prohibits government from compelling an individual to think or act contrary to his religious beliefs. No decision of this Court holds that the Clause protects an individual against having his religious sensibilities offended by witnessing actions of government to which he objects.

ARGUMENT

THE SSN REQUIREMENT SERVES A COMPELLING GOVERNMENTAL INTEREST THAT CANNOT BE ACHIEVED THROUGH ANY LESS BURDENSOME MEANS

The district court has held unconstitutional as applied to appellee Roy the requirement that applicants for and recipients of AFDC and food stamps provide to their state welfare agencies a social security number for every household member who receives benefits. As the only requirement Congress has expressly imposed on the way in which recipients of these benefits are identified, the statutory provisions at issue come to this Court with a heavy presumption of constitutionality. The district court's invalidation of these provisions seriously jeopardizes the government's ability to combat fraud in federal welfare programs and generally to promote the administrative efficiency of such programs through the uniform application of a logical, neutral rule.

These adverse effects need not be suffered, because the district court's ruling is based on a flawed premise—that the smaller the number of persons objecting to a neutral requirement on religious grounds, the greater their claim to an exemption from the requirement. No decision of this Court supports such a peculiar result. Instead, it is clear that, in the circumstances here presented, the individual's interest in religious liberty must yield to the greater interest of society in the efficient and effective administration of its welfare programs.

A. The Availability Of Alternatives To The SSN Requirement Should Be Evaluated On The Basis Of The Programmatic Governmental Interests Furthered By That Requirement Rather Than The Cost Of Granting Exemptions To One Or A Handful of Individuals

1. This Court has repeatedly emphasized that although "the Free Exercise Clause provides substantial protection for lawful conduct grounded in religious belief, • • •

'[n]ot all burdens on religion are unconstitutional. . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.'" *Bob Jones University* v. *United States*, 461 U.S. 574, 603 (1983) (quoting *United States* v. *Lee*, 455 U.S. 252, 257-258 (1982)).

In both *Bob Jones University* and *Lee*, the Court addressed the question presented here, namely, how to resolve the conflict between a requirement that serves a compelling governmental interest and the contrary dictates of a sincerely held religious belief. When such a conflict occurs, "[t]he remaining inquiry is whether accommodating the • • • belief will unduly interfere with fulfillment of the governmental interest." *United States* v. *Lee*, 455 U.S. at 259. If the belief "cannot be accommodated with that compelling governmental interest, • • • and no 'less restrictive means' • • • are available to achieve the governmental interest," the government's interest must prevail. *Bob Jones University*, 461 U.S. at 604 (citations and footnote omitted). As the Court concluded in *Lee*, 455 U.S. at 259 (footnote omitted):

> To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, see *e.g.*, *Thomas* [v. *Review Board*, 450 U.S. 707 (1981)]; *Sherbert* [v. *Verner*, 374 U.S. 398 (1963)], but there is a point at which accommodation would "radically restrict the operating latitude of the legislature." *Braunfeld* [v. *Brown*, 366 U.S. 599, 606 (1961)].

As we demonstrate below, that point has been exceeded by the district court's decision in this case.

2. We do not contend that Roy's beliefs are not religious in nature, nor do we contend that his beliefs are not sincerely held. But the district court also found that the government has a compelling interest, as a general

matter, in requiring SSNs in the administration of the AFDC and Food Stamp programs (J.S. App. 15a, 18a, 32a). The dispute in this case thus turns on the "least restrictive means" aspect of the inquiry—that is, whether the test is to be applied to the programmatic governmental interests furthered by the SSN requirement, or whether the Free Exercise Clause requires a case-by-case determination of each individual claim to an exemption. In our view, the district court erred in considering appellees' claim in isolation and in placing its primary focus on the number of persons who potentially might seek an exemption from the SSN requirement.[12] Instead, it should have focused on the programmatic interests advanced by the statutory requirements at issue—verifying eligibility, preventing and detecting fraud, and promoting efficient administration of massive government programs—and deferred to Congress's judgment that there should be no exceptions to the statutory requirements.

In other words, if the government can accomplish its objectives equally well by adopting a less burdensome alternative applicable to the populace as a whole, then it may be appropriate to require the government to adopt that alternative in the case of a particular plaintiff. But if the alternative chosen is the *most* effective means of accomplishing the compelling objective—as SSNs unquestionably are in achieving Congress's goals in the administration of federal welfare programs—then the government should not be required to devise less effective alternatives simply because the granting of a handful of ex-

---

[12] Though we do not believe that the number of persons seeking an exemption is relevant to the correct disposition of this case, we note that appellees' objections are not unique. See *Callahan* v. *Woods*, 736 F.2d 1269 (9th Cir. 1984); *Stevens* v. *Berger*, 428 F. Supp. 896 (E.D.N.Y. 1977); *Mullaney* v. *Woods*, 97 Cal. App. 3d 710, 158 Cal. Rptr. 902 (1979); *Atwood* v. *Idaho Dep't of Health & Welfare*, No. 83-3066 (D. Idaho filed May 23, 1983). See also note 14, *infra*.

emptions might be thought to work only a marginal interference with the legislative purposes.[13]

The district court adopted a totally different and, we submit, plainly erroneous approach in its consideration of the compelling programmatic interests served by the SSN requirement. The court did not conclude that the government's interests could be served equally well by dispensing with the SSN requirement for all AFDC and Food Stamp participants; indeed, it did not even conclude that the government's interests could be served equally well by dispensing with the SSN requirement for Little Bird of the Snow alone. Instead, the court concluded that the government should be forced to accept admittedly less effective alternatives (see J.S. App. 19a-21a) simply because the benefits that appellees seek on Little Bird of the Snow's behalf represent such an infinitesimal fraction of federal expenditures for the entire AFDC and Food Stamp programs. The court's approach was analogous to holding that religious exemptions to the payment of taxes should be granted unless the government is able to show that even a few such exemptions would cause the income tax system to collapse. But such an approach has never been accepted in tax cases (see *Lee*, 455 U.S. at 260, cit-

[13] A hypothetical example will serve to illustrate our submission. A state motor vehicle department that issues drivers' licenses surely has a compelling interest in requiring every applicant to pass a vision test. If the department were to schedule vision tests only on Saturdays, it undoubtedly would receive objections from Orthodox Jews, who could not, consistent with their religious beliefs, drive to the testing center on that day. Because the department's compelling interest could be satisfied equally well by offering vision tests on a day other than Saturday, it would be appropriate to require the department to accommodate religious objections to Saturday testing by offering vision tests on another day. By the same token, therefore, the government should be required to grant appellees an exemption from the SSN requirement only if it could be shown that the compelling interests furthered by that requirement could be achieved equally well by employing some other means applicable to all AFDC and Food Stamp participants, and not just to appellees.

ing *Lull* v. *Commissioner*, 602 F.2d 1166 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); and *Autenrieth* v. *Cullen*, 418 F.2d 586 (7th Cir. 1969), cert. denied, 397 U.S. 1036 (1970)), and it is no more viable here.

That the programmatic analysis we advocate is correct is clear from the fact that any "accommodation" the government might make for Little Bird of the Snow alone would entail unacceptable interference with the government's compelling interests. The government could accommodate appellees in one of two ways. First, it could accept the risk of fraud that even the district court acknowledged is inherent in granting an exemption to Little Bird of the Snow (see J.S. App. 19a). Whatever the degree of that risk, we submit that government should not be required to accept it. Not only is Congress entitled to insist on the most effective means for proper administration of its welfare programs, but the public is entitled to the greatest assurance possible that the programs are being administered evenhandedly and fairly. The granting of exemptions, and the concomitant risk of fraud—no matter how slight—cannot help but undermine public confidence in the integrity of these welfare programs.

Second, the government could accommodate appellees' religious scruples and at the same time institute special procedures applicable to their case that would bring the risk of fraud to the same level as obtains in the usual case. But those special procedures would entail such extraordinary burdens and costs that it could no longer be said that the effort necessary for accommodation is reasonable.

If, as we posit, government should not be required to alter its practices in a manner that necessarily heightens the risk of fraud, then the only other alternatives that government could offer would entail such a high cost that even the district court would not require the government to accommodate appellees' religious beliefs (see J.S. App. 16a). Exempting Little Bird of the Snow from the SSN requirement *without* subjecting the government to a

heightened risk of fraud would require the government to devise and implement an entirely new but equally effective system as a substitute for the SSN requirement; the cost of such an alternative system is estimated to be in excess of $900 million (J.A. 24). The district court was able to disregard this cost only by requiring the government to forgo the purposes served by the SSN requirement in the case of Little Bird of the Snow; the court did not and could not demonstrate that accommodating Little Bird of the Snow alone would not impair the government's compelling interest in having *all* program participants adhere to that requirement.

This Court's decision in *Lee* demonstrates the error of the district court's analysis. There, the Court rejected the claim of an Amish employer for an exemption from paying social security taxes for his Amish employees. The Court did not confine its analysis to the effect on the social security program of exempting only the Amish; if it had, the programmatic effect would have been beneficial, because the Amish not only oppose paying into the social security system but they also oppose receiving benefits, and benefit pay-outs far exceed contributions. See *Lee*, 455 U.S. at 262 (Stevens, J., concurring). Instead, the Court looked to the government's compelling interest in uniform administration of the social security program and tax collection in general and concluded that mandatory participation by all employers was essential to the fiscal vitality of the program. *Id.* at 258-260.[11]

---

[11] In his concurring opinion in *Lee*, 455 U.S. at 264 n.3, Justice Stevens suggested that "laws intended to provide a benefit to a limited class of otherwise disadvantaged persons [arguably] should be judged by a different standard than that appropriate for the enforcement of neutral laws of general applicability." This might be so, Justice Stevens opined, because vast numbers of persons would have an economic motivation to feign religious claims in order to obtain tax exemptions, but no such motivation would be present in a case that forced the plaintiff to forgo important monetary benefits. We agree that Justice Stevens' observation may well hold true for a "lost plaintiff," perhaps including appellee Roy,

Like *Lee*, the earlier cases of *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), and *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), also demonstrate the impropriety of ignoring a legislative determination that individualized exemptions would undermine the purposes behind a neutral law of general applicability. In *Braunfeld*, the appellants were Orthodox Jewish merchants whose religious convictions required that their places of business remain closed on Saturdays. They sought an injunction to prevent enforcement against them of a state Sunday-closing law, on the ground that closing their businesses on Sundays interfered with their ability to earn a living. The Court rejected the claim, noting that "to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity" (366 U.S. at 608). Had the Court employed the analysis used by the district court in this case, however, it undoubtedly would have been forced to conclude that permitting a few Jewish merchants to keep their businesses open on Sundays would not have significantly interfered with the legislative purposes.[20]

---

who decides to forgo benefits in favor of adherence to religious scruples and is willing to undergo the rigors of litigation to vindicate his perceived rights. But once the right to an exemption has been established by a decision of this Court, future claimants need not face any difficult choices. Moreover, acceptance of Roy's claim in this case clearly would provide an economic incentive for future AFDC and Food Stamp applicants to follow Roy's lead, because they would know that they could escape the government's most effective means for detecting fraud merely by feigning a sincere religious objection to furnishing their SSNs to their state welfare agencies. Indeed, the testimony in this case establishes that the mere existence of the SSN requirement serves as a deterrent to fraud (J.A. 346-347).

[20] The Court also noted that to permit the exemption might provide the Jewish merchants with a competitive advantage over other merchants who had no religious objection to the Sunday-closing law. *Braunfeld*, 366 U.S. at 606-609. A similar problem looms large

Prince likewise involved a state statute that imposed an absolute ban on the activity in which the appellants there sought to engage. The statute at issue was a child labor law forbidding children from engaging in street sales of magazines, newspapers, and other merchandise. Unlike the Jewish merchants in *Braunfeld*, whose religious faith was only indirectly burdened by the statute in question (see 366 U.S. at 605-607), the appellants in *Prince* were Jehovah's Witnesses whose religious faith specifically *required* that they engage in the activity the state sought to prohibit—street sales of their religious tracts. Nevertheless, the Court held that the statute was constitutional as applied to the appellants, even though there was clearly no danger to the particular child in question, who had been closely supervised by her aunt.

These cases clearly demonstrate that when the legislature seeks to advance a compelling governmental interest through uniform application of a facially neutral requirement, it is not relevant that granting exemptions in rare cases might work only a minute or incremental interference with the governmental interest. This analysis compels reversal of the decision below. Achievement of the compelling governmental interest in preserving and promoting the fiscal integrity of the AFDC and Food Stamp programs is dependent upon the proper verification of income and resources and the correct payment of benefits to needy individuals. Whether or not any one individual might seek to collect benefits to which he is not entitled is irrelevant; the pertinent point is that the programs as a whole cannot be managed effectively without the SSN requirement. Programs the size of the AFDC and Food Stamp programs cannot possibly be administered without the aid of computer technology, and computers communicate with each other in numbers. One who is opposed on religious grounds to computers

---

in this case because the district court's decision effectively assures that the welfare applications of appellees and those who share their beliefs will not receive the same degree of scrutiny that all other applicants undergo.

and numbers might well find the SSN requirement objectionable, but no decision of this Court suggests that such an indirect burden on religious freedom is a sufficient basis for striking down a neutral procedural requirement that is undeniably essential to sound program administration. As Chief Justice Warren observed in *Braunfeld* v. *Brown*, 366 U.S. at 606, there comes a point at which accommodation of such religious beliefs would "radically restrict the operating latitude of the legislature."

Moreover, the decision below leads to absurd consequences. Essentially, the district court has held that government must accommodate those individuals holding the most unique and idiosyncratic religious beliefs because the cost of exempting those few individuals from a facially neutral procedural requirement would be quite small. The logical corollary to this holding is that government may refuse to accommodate religious beliefs so widely held that the administrative burden and programmatic impact would be deemed too great. In effect, the right to the free exercise of religious beliefs would shrink as the number of persons who share those beliefs grows. Such a result defies common sense. Furthermore, entitlement to a religious exemption would change over time, in accordance with unpredictable increases or decreases in the number of persons similarly situated. Constitutional rights should not be made to rest on such shifting sands.

In addition, there would appear to be no limit to the "accommodations" that could be required of government under the district court's analysis. For example, Roy objects to the use of computers but not strongly enough to protest issuance of his AFDC check by a computer. Another plaintiff, however, could insist that the government process his check manually or that he be paid in cash instead of by check. Viewing each case in isolation, as the district court's decision requires, the government might well be able to accommodate each demand without

undue burden or expense. Logic compels the conclusion, however, that there are limits to the accommodations government is required to make in administering facially neutral program requirements, and those limits have been exceeded by the decision below.

3. This Court's decisions construing the First Amendment's protection of speech likewise demonstrate the error of focusing solely on the number of persons who might assert a claim for special treatment. Eschewing that approach, the Court instead has examined the consequences of wholesale exemptions in determining whether a particular plaintiff's claim to an exemption overrides the challenged government regulation. See, *e.g.*, *Regan* v. *Time, Inc.*, No. 82-729 (July 3, 1984), slip op. 16 n.12 ("[I]n determining whether a time, place, and manner regulation substantially serves the State's interest, the effectiveness of the regulation should not be measured solely by the adverse consequences of exempting a particular plaintiff from the regulation."); *Clark* v. *Community for Creative Non-Violence*, No. 82-1998 (June 29, 1984), slip op. 8 ("[I]t is evident from our cases that the validity of this regulation need not be judged solely by reference to the demonstration at hand."); *Heffron* v. *Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981) ("[T]he Minnesota Supreme Court took too narrow a view of the State's interest in avoiding congestion and maintaining the orderly movement of fair patrons on the fairgrounds. The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON."); *cf. United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 135 (1981) (Brennan, J., concurring) (citation omitted) ("Surely, the Government is correct when it argues that the Postal Service 'is not required to make a case-by-case showing of a compelling need for the incremental revenue to be realized from charging postage to each organization or individual who desires to use the postal system to engage in expression protected by the First Amendment.'").

These recent decisions are entirely in keeping with the Court's earlier decisions upholding restrictions on expression without regard to the number of persons whose conduct is affected or the ease with which the state might accommodate them. *See Adderley* v. *Florida*, 385 U.S. 39 (1966); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941).

These cases are particularly significant because, at the same time that the Court has focused on the programmatic effects of wholesale exemptions, the Court has not required the government to show a substantial likelihood that large numbers of persons could be expected to claim similar exemptions; instead, the Court has been content to note that if the government granted an exemption to one person or group, it would be required to grant exemptions to all. *See, e.g., Hoffron*, 452 U.S. at 652-654. Here, too, the government need not show that large numbers of persons share appellees' religious beliefs; it is sufficient that the government would have no principled basis upon which to grant some religiously-grounded exemptions and deny others. *Cf. United States* v. *Lee*, 455 U.S. at 263 n.2 (Stevens, J., concurring) (noting the "overriding interest in keeping the government * * * out of the business of evaluating the relative merits of differing religious claims").

4. The present case can readily be distinguished, on both procedural and substantive grounds, from other cases in which this Court has required states to grant religious exemptions from otherwise applicable statutory requirements. *See Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Both *Thomas* and *Sherbert* involved applicants for unemployment compensation who, as a result of having been denied benefits, were forced to choose between having no income or continuing to engage in employment-related activity that would have violated their religious beliefs. In *Yoder*, the state had enforced its compulsory school attendance statute against Amish parents whose religious beliefs

prohibited their children's formal education beyond the eighth grade. This Court held in all three cases that the states were required to accommodate the religious beliefs of the individuals involved.

In contrast to the present case, however, the states in *Thomas* and *Sherbert* were unable to demonstrate a compelling governmental interest. Compare *Thomas*, 450 U.S. at 719, and *Sherbert*, 374 U.S. at 406-409, with J.S. App. 15a, 18a, 22a. It was therefore unnecessary even to reach the question whether the states' interests could be achieved through less burdensome means, either on an individual or programmatic basis.

Moreover, the statutes under consideration in *Thomas*, *Yoder*, and *Sherbert* explicitly permitted exemptions from their general requirements based on individualized determinations of "good cause."[10] Because the legislature in each of those cases had clearly contemplated such exemptions under certain circumstances, the states were unable to persuade the Court that they had sought to accomplish their objectives in the least restrictive manner with respect to the individuals at hand. The statutes in *Thomas*, *Yoder*, and *Sherbert*, unlike the statutes here, provided by their own terms the necessary "play in the joints," *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970), to allow for exemptions grounded in the Free Exercise Clause.

By contrast, the statutory provisions requiring applicants for AFDC payments and food stamps to provide

---

[10] Thus, the provisions of the South Carolina Unemployment Compensation Act at issue in *Sherbert* provided that employees were ineligible for benefits only if they "'[have] failed, *without good cause*'" to apply for, accept or return to work. 374 U.S. at 400 n.3 (emphasis added). Similarly, in *Thomas*, the statute provided that an individual was ineligible for benefits if he "voluntarily left his employment *without good cause*." 450 U.S. at 710 n.1 (emphasis added). Finally, the Wisconsin compulsory school attendance law in *Yoder* likewise provided that its requirements were inapplicable "'to any child excused *for good cause* by the school board.'" 406 U.S. at 208 n.2 (emphasis added).

social security numbers to their state welfare agencies do not permit exemptions for any reason. Furthermore, the increasing importance that Congress attaches to uniform adherence to the SSN requirement cannot be doubted. For example, the use of SSNs in the Food Stamp program was optional with the states until 1981 (see 7 U.S.C. (Supp. IV 1980) 2025(f)); in that year, Congress changed the pertinent statutory language from "may" (*ibid.*) to "shall" (7 U.S.C. 2025(e)). More recently, Congress expanded the number of programs to which the mandatory SSN requirement applies. See pages 15-16, *supra*, and notes 1 & 10, *supra*. It did so on the recommendation of the Grace Commission, which reported that computer matching employing SSNs "is the Federal Government's most cost-effective tool for verification or investigation in the prevention and detection of fraud, waste and abuse." 7 The President's Private Sector Survey on Cost Control, *Management Office Selected Issues, Information Gap in the Federal Government* 90 (1984); see also *id.* at 82-92; 7 The President's Private Sector Survey on Cost Control, *Report on Federal Feeding* 46-55 (1984). Thus, Congress has determined that the compelling governmental interest in verifying program eligibility and preventing welfare fraud cannot be reconciled with the granting of exemptions. That Congress might have written the statutes differently, to permit individually-determined exemptions, is irrelevant. See *United States* v. *Lee*, 455 U.S. at 260-261;[17] *Braunfeld* v. *Brown*, 366 U.S. 599, 608 (1961).[18] The district

---

[17] In *Lee*, the Court noted that Congress had permitted an exemption from the social security tax for self-employed Amish. 26 U.S.C. 1402(g). The Court declined to extend a similar exemption to Amish employers on constitutional grounds, reasoning that "Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system." 455 U.S. at 260.

[18] The Orthodox Jewish merchants in *Braunfeld* objected to the fact that the Sunday-closing law there at issue did not permit ex-

court erred in ignoring the legislative judgment in this regard and engrafting onto the statutes an unfounded exemption that cannot be squared with the underlying legislative purposes.

Thomas, *Sherbert*, and *Yoder* also presented issues of a fundamentally different nature than the instant case. In *Thomas* and *Sherbert*, the state statutes imposed a substantive condition on the right to unemployment benefits that operated so as to discriminate against the exercise of religious beliefs. An employee who was unavailable for work due to a medical disability was entitled to unemployment benefits, but an employee who declined work or was fired on the basis of religious objections was deemed ineligible for benefits. See *United States* v. *Lee*, 455 U.S. at 264 n.3 (Stevens, J., concurring) (*Thomas* and *Sherbert* may be viewed "as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect."). Thus, even though the South Carolina and Indiana unemployment compensation statutes were drafted in neutral terms, in practice they operated so as to treat religious disabilities differently from all other disabilities. In the present case, by contrast, no substantive requirement, religious or otherwise, operates to deny AFDC and Food Stamp benefits to appellees. Rather, what is at issue is merely an informational requirement used to establish a claimant's entitlement to benefits. All persons who decline to provide the information necessary to establish eligibility, for whatever reason, must be denied benefits; religion is simply not a factor in the

---

emptions for religious reasons. The Court noted that "[a] number of States provide such an exemption, and this may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation but with its constitutional limitation." 366 U.S. at 608 (footnote omitted). In the present case, given the importance of having a nationally uniform method of identifying recipients of AFDC and food stamps, one might well question whether it would even be wise for Congress to provide exceptions. In any event, exceptions are not constitutionally required.

decisionmaking process. In short, there simply is no parallel between the challenged statutes in *Thomas* and *Sherbert* and the SSN requirement.

Finally, *Yoder* is essentially sui generis. Unlike the typical Free Exercise case, involving a clash between minority rights and the interests of society as a whole, in *Yoder* both the Amish parents and the State of Wisconsin shared a single common interest in providing for the welfare of Amish children. In these circumstances, it is not surprising that the Court rejected the State's attempt, in its capacity as parens patriae, to displace "the fundamental interests of parents * * * to guide the religious future and education of their children" (406 U.S. at 232). The Court stressed the "primary role of the parents in the upbringing of their children * * * as an enduring American tradition" (*ibid.*), and, on the unusual strength of the record made by the Amish parents, refused to permit the State to oust the parents from that role. See also *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Even in *Yoder*, however, the Court cautioned that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens" (406 U.S. at 233-234). The Court simply concluded that the State had failed to make the strong showing necessary to overcome parental primacy in this delicate area (*id.* at 234). See also page 43, *infra*.

B. The Government's Compelling Interest In The Effective and Efficient Functioning Of Its Welfare Programs Cannot Be Satisfied If Appellees Are Exempted From The SSN Requirement

Even if a case such as this were to be analyzed on an individual, rather than a programmatic, basis, we submit that the district court erred in concluding that the government's compelling interest can be satisfied without re-

quiring Roy to furnish an SSN for Little Bird of the Snow. There is something fundamentally wrong with the notion that an individual can claim an entitlement to government benefits while at the same time refusing to comply with that portion of the program designed to verify eligibility and detect fraud most effectively. If appellees wish to avail themselves of government benefits, the Free Exercise Clause does not stand as an obstacle to the government's ability to ensure, as effectively and efficiently as possible, that they are legitimately entitled to receive them. The purpose of the AFDC and Food Stamp programs, after all, is to provide assistance only to the needy. That purpose is undeniably threatened if the government is stripped of the means to ensure that it is, in fact, the needy who are being assisted.

In essence, appellees insist on partaking of government benefits, but only on their own terms. But surely no one would contend that appellees could walk into a state welfare office, assert that they are eligible for welfare benefits, and then state that they object, on religious grounds, to having the government know anything more about them. Clearly, the government is entitled to the information that Congress has determined to be necessary to ensure that welfare applicants are in fact eligible for aid. And appellees' position in this case does not become any more tenable simply because they are willing to provide *some* identifying information; it is not open to appellees to pick and choose which statutory requirements they wish to follow. See *McElrath* v. *Califano*, 615 F.2d 434, 441 (7th Cir. 1980) ("[T]he claim of the appellants to receive welfare benefits on their own informational terms does not rise to the level of a constitutional guarantee."); *cf. Schweiker* v. *Hansen*, 450 U.S. 785, 790 (1981) (Congress conditioned the receipt of Social Security benefits on the filing of a written application, and a "court is no more authorized to overlook [this requirement] than it is to overlook any other valid requirement for the receipt of benefits.").

Moreover, appellees' suggested "less restrictive alternatives" simply do not satisfy Congress's purposes. For example, the dual use of Roy's own SSN to identify himself and Little Bird of the Snow is inherently inconsistent with the role of SSNs as unique *personal* identifiers. The use of Little Bird of the Snow's name alone is likewise an ineffective alternative. Though her name is concededly unusual (but see *Arthur* v. *Washington State Dep't of Social & Health Services*, 19 Wash. App. 542, 549, 576 P.2d 921, 925 (1978) ("A name affords neither precision nor permanence. A social security number does.")), computer cross-matching by name is simply not as reliable as computer cross-matching by SSN, and in some cases it is not even possible. See page 12 & note 8, *supra*. And surely it is not tenable for the constitutionality of federal statutes to turn on the names of the litigants.

The ineffectiveness of Roy's suggested "alternatives" provides yet another basis for distinguishing this case from *Wisconsin* v. *Yoder*, *supra*. In *Yoder*, the Court specifically noted that excusing Amish children from Wisconsin's compulsory education laws beyond the eighth grade in no way jeopardized the State's admittedly strong interest in universal compulsory education (406 U.S. at 235-236). This was so, the Court concluded, because the Amish had carried the extremely "difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education" (*id.* at 235). Appellees, on the other hand, cannot carry the "difficult burden" of demonstrating the adequacy of their proffered "alternatives" to providing an SSN for Little Bird of the Snow.

It is also significant that there really is no means by which the government can fully accommodate Roy's religious beliefs. Although Roy has focused his most vigorous opposition on the SSN requirement, the record reflects that he objects, on religious grounds, to the use of

any information that would identify his family as individuals and that he would be "upset" by the state welfare department's assignment of a unique case number—even if it were not an SSN—to Little Bird of the Snow. See pages 6-7, *supra*. The record also reflects, however, that Little Bird of the Snow, even if exempted from the SSN requirement, still would be subject to numerical identification under some separate system in order to keep track of the information relating to her benefits (J.A. 32, 37-38). Even appellees have not suggested that Little Bird of the Snow's benefits should be processed manually, with her file stored not in a computer but in the desk drawer of a welfare case worker. Yet inclusion of Little Bird of the Snow's records in a government computer system obviously requires the assignment of a unique numerical identifier, if for no other reason than to ensure that she receives the benefits she seeks. When the "alternatives" proposed by appellees necessarily entail virtually identical "evils" to those that prompted this litigation in the first place, it makes no sense whatever to compel the government to devise a special system that, at best, might marginally reduce, but not eliminate, appellees' religious objections to the system mandated by Congress.

C. The Free Exercise Clause Does Not Prevent The Government From Assigning And Using SSNs In The Case Of AFDC And Food Stamp Applicants Who Decline To Furnish SSNs Themselves

The district court's injunction in any event is overbroad. The court cited no legal basis to justify enjoining Secretary Heckler from "using or disseminating" Little Bird of the Snow's SSN and directing her to demand that all other entities, governmental and private, cease using Little Bird of the Snow's SSN. The Free Exercise Clause, even under the most expansive interpretation, only prohibits government from compelling an individual to think or act contrary to his religious beliefs; no decision of this Court holds that the Clause protects

an individual from having his religious sensibilities offended by witnessing actions of government to which he objects.

This Court's early Free Exercise jurisprudence provided protection only for an individual's religious beliefs and opinions, but not his religiously-grounded actions. See, *e.g.*, *Reynolds* v. *United States*, 98 U.S. 145, 166 (1878). Over time, the Court refined the "belief-action" dichotomy, concluding that the Free Exercise Clause guarantees an absolute right to free religious beliefs, but that religiously-grounded actions are subject to governmental regulation for the protection of society. See, *e.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 304 (1940). This distinction remains a fundamental part of the Court's Free Exercise jurisprudence today. See, *e.g.*, *McDaniel* v. *Paty*, 435 U.S. 618, 626-627 (1978) (plurality opinion).

It is a quantum leap, however, and one that this Court has never taken, to hold that governmental action that neither compels an individual to accept beliefs that violate his religion nor personally to undertake actions to which he objects falls within the protection of the Free Exercise Clause. Cf. *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984). Surely there is no Free Exercise Clause violation in requiring appellees to do nothing at all, even though they may object to what the government is doing.

Assuming arguendo, therefore, that the Free Exercise Clause could be invoked to prohibit the government from requiring appellee Roy to provide Little Bird of the Snow's SSN (*i.e.*, to *take action* that infringes his religious beliefs), nevertheless the Clause affords no protection against the *government's* use of Little Bird of the Snow's SSN. Although Roy does indeed object to the government's use of Little Bird of the Snow's SSN, that objection does not coerce him into altering his religious beliefs, nor does it compel him to take any action what-

er.[20] It is one thing to hold that an individual may be exempt, on Free Exercise grounds, from having to comply with a generally applicable governmental requirement, but it is quite a different matter to hold that the government must change the manner in which *it* conducts its business so as not to offend appellees. Cf. *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982).

Were the rule otherwise, those professing religious objections to the conduct of war, to the manner in which government spends tax dollars, or to the transaction of business on the Sabbath could assert a Free Exercise Clause violation based on nothing more than their wit-

---

[20] Although the statutes at issue in this case require the applicant for benefits to provide the state welfare agency with the SSN of all household members, thereby mandating action on the part of the applicant, it would not be an unreasonable construction of the statutes to conclude that they are satisfied by the government's ability to use SSNs already in its possession, as is the case with Little Bird of the Snow, or by the government's ability to assign (and then use) an SSN for a person who refuses to apply for one. Cf. Exec. Order No. 9397, *supra*; 42 U.S.C. 408(c)(2)(B)(i)(II). Indeed, we are advised by the Social Security Administration that the agency itself assigns SSNs to persons who are required by federal law to have one but decline to complete an application. If, for religious reasons, the individual requiring an SSN does not wish to receive a social security card, the agency will accommodate that request. See Office of Operational Policy & Procedures, Social Security Administration, U.S. Dep't of Health & Human Services, *SSA Pub. No. 64-010(BK), Social Security Number Applications* ¶ RM 00202.020I.3 (1984). Similarly, when an applicant refuses to sign an application for an SSN on religious grounds, SSA personnel may sign in lieu of the applicant. *Id.* ¶ RM 00202.020I.14a. The only exception is that no SSN may be assigned if the applicant refuses to submit the necessary evidence of age, identity, and citizenship or alien status. *Ibid.* In that case, however, it seems clear that the applicant could not qualify for AFDC or Food Stamp benefits in any event. See page 42, *supra*.

running of governmental action that they find offensive on religious grounds. As the Court recognized in *Lee*, 455 U.S. at 260, this is simply not the law.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

KATHRYN A. OBERLY
Assistant to the Solicitor General

PETER R. MAIER
Attorney

AUGUST 1985

Supreme Court, U.S.
FILED
SEP 27 [illegible]
JOSEPH F. SPANIOL, [illegible]
CLERK

No. 84-780

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*, *Appellants*,

v.

STEPHEN J. RITE, *et al.*, *Appellees*.

On Appeal From The United States District Court For The Middle District Of Pennsylvania

---

BRIEF FOR THE APPELLEES

Of Counsel:
CHARLES S. SIMS
American Civil Liberties Union
132 West 43rd Street
New York, NY 10036

GARY S. GILDEN
(Counsel of Record)
130 South College Street
Carlisle, PA 17013
(717) 243-4611
FRANKLIN A. MILES, JR.
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108
(717) 232-8000
STEVAN PY[illegible]
American Civil Liberties Union Foundation of Pennsylvania
Independence Mall
21 South 5th Street
Philadelphia, PA 19106

PRESS OF BAR PRINTING, HYATTSVILLE, MD 20781 (301) 864-4002

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Is exempting persons holding a sincere religious objection to the use of a social security number from the general statutory requirement that persons shall furnish a social security number as a condition of receiving benefits under the Food Stamp and Aid to Families with Dependent Children programs, consistent with Congress' intent to provide welfare benefits to the needy without violating recipients' religious beliefs?

II. Does requiring applicants for and recipients of AFDC and Food Stamp benefits to provide social security numbers violate the free exercise rights of eligible parents who assert a sincere religious objection to the SSN requirement on behalf of their minor child?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	IV
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	1
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. EXEMPTING APPELLEES FROM THE SSN REQUIREMENT IS CONSISTENT WITH CONGRESS' INTENT TO PROVIDE WELFARE BENEFITS TO THE NEEDY WITHOUT VIOLATING THE RELIGIOUS BELIEFS OF BENEFIT RECIPIENTS	9
II. THE SSN REQUIREMENT, AS APPLIED IN THIS CASE, VIOLATES APPELLEES' RELIGIOUS BELIEFS BECAUSE IT DOES NOT SERVE A COMPELLING GOVERNMENTAL INTEREST	15
A. The Risk Of Fraud And Overpayment From Accommodation Of The Religious Exemption Sought Here Does Not Present A Compelling Governmental Interest	20
B. The Impairment Of Administrative Efficiency From Accommodation Of The Religious Exemption Sought Here Does Not Present A Compelling Governmental Interest	23
III. ACCOMMODATING THE RELIGIOUS BELIEFS OF APPELLEES AND OTHER RELIGIOUS OBJECTORS WOULD NOT UNDULY THREATEN THE INTERESTS SERVED BY THE SSN REQUIREMENT	26
A. Accommodating Appellees In This Particular Case Would Not Interfere With Any Significant Governmental Interest	27
B. Accommodating Other Religious Objectors To The SSN Requirement Would Not Interfere With Any Significant Governmental Interests	33
C. The Government's Proposed "Programmatic Interest" Analysis Is Inconsistent With The Precedents Of This Court	37
D. The Government's Proposed "Programmatic Interest" Analysis Violates The Fundamental Principle That The Majority May Not, By Legislation, Invade Constitutional Rights Of The Minority	42

Table of Contents Continued

	Page
IV. The District Court's Injunction Is Not Overbroad	46
Conclusion	49
Appendix	1a

TABLE OF AUTHORITIES

	Page
Adickes v. *S. H. Kress & Co.*, 398 U.S. 144 (1970)	47
Atwood v. *Idaho Department of Health and Welfare*, No. 83-3086 (D. Idaho, filed May 23, 1983)	36
Bob Jones University v. *United States*, 461 U.S. 574 (1983)	10, 19
Braunfeld v. *Brown*, 366 U.S. 599 (1961)	26, 41
Califano v. *Boles*, 443 U.S. 282 (1979)	25
Callahan v. *Woods*, 658 F.2d 679 (9th Cir. 1981), *on remand*, 559 F.Supp. 163 (N.D. Cal. 1982), *rev'd*, 736 F.2d 1269 (9th Cir. 1984)	3
Callahan v. *Woods*, 736 F.2d 1269 (9th Cir. 1984)	36
Cantwell v. *Connecticut*, 310 U.S. 296 (1940)	35
Carrington v. *Rash*, 380 U.S. 89 (1965)	24-25
Clark v. *Community for Creative Non-Violence*, 104 S.Ct. 3065 (1984)	42-43
Cleveland Board of Education v. *LaFleur*, 414 U.S. 632 (1974)	24
Committee for Public Education v. *Nyquist*, 413 U.S. 756 (1973)	19
Elrod v. *Burns*, 427 U.S. 347 (1976)	38
Estate of Thornton v. *Calder*, 105 S.Ct. 2914 (1985)	16
Everson v. *Board of Education*, 330 U.S. 1 (1947)	18, 19
Frontiero v. *Richardson*, 411 U.S. 677 (1973)	24
Gillette v. *United States*, 401 U.S. 437 (1971)	19, 44
Goldberg v. *Kelly*, 397 U.S. 254 (1970)	25, 26
Graham v. *Richardson*, 403 U.S. 365 (1971)	22
Harris v. *McRae*, 448 U.S. 297 (1980)	19
Heffron v. *Int'l Society for Krishna Consciousness*, 452 U.S. 640 (1981)	43
I.N.S. v. *Chadha*, 462 U.S. 919 (1983)	46
I.N.S. v. *Phinpathya*, 464 U.S. 183 (1984)	13
Martin v. *City of Struthers*, 319 U.S. 141 (1943)	35
McGowan v. *Maryland*, 366 U.S. 420 (1961)	19
Memorial Hospital v. *Maricopa County*, 415 U.S. 250 (1974)	21, 25
Meyer v. *Nebraska*, 262 U.S. 390 (1923)	45
Mississippi University for Women v. *Hogan*, 458 U.S. 718 (1982)	45

Table of Authorities Continued

	Page
Mobile v. *Bolden*, 446 U.S. 55 (1980)	19
Mullaney v. *Woods*, 97 Cal. App.3d 710, 158 Cal. Rptr. 902 (1979)	36
Murdock v. *Pennsylvania*, 319 U.S. 105 (1943)	19
NLRB v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979)	7, 9, 15, 16, 17
People v. *Woody*, 394 P.2d 813, 40 Cal. Rptr. 69 (1964)	45
Philbrook v. *Glodgett*, 421 U.S. 707 (1975)	10
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925)	18, 45
Prince v. *Massachusetts*, 321 U.S. 158 (1944)	19, 40, 41
Pullman-Standard v. *Swint*, 456 U.S. 273 (1982)	27
Rector, Etc., of Holy Trinity Church v. *United States*, 143 U.S. 457 (1892)	14
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974)	15
Roemer v. *Board of Public Works of Maryland*, 426 U.S. 736 (1976)	27
Rogers v. *Lodge*, 458 U.S. 613 (1982)	27
Schneider v. *New Jersey*, 308 U.S. 147 (1939)	22, 25, 35
Schweiker v. *Hansen*, 450 U.S. 785 (1981)	33
Sherbert v. *Verner*, 374 U.S. 398 (1963)	*passim*
Shapiro v. *Thompson*, 394 U.S. 618 (1969)	22, 25, 29
Speiser v. *Randall*, 357 U.S. 513 (1958)	19, 25
Stanley v. *Illinois*, 405 U.S. 645 (1972)	24
Stevens v. *Berger*, 428 F. Supp. 896 (E.D.N.Y. 1977)	3, 31, 34, 35-36
Thomas v. *Collins*, 323 U.S. 516 (1945)	20
Thomas v. *Review Board*, 450 U.S. 707 (1981)	*passim*
Torcaso v. *Watkins*, 367 U.S. 488 (1961)	22
TWA v. *Hardison*, 432 U.S. 63 (1977)	16
United States v. *Ballard*, 322 U.S. 78 (1944)	3
United States v. *Carolene Products Co.*, 304 U.S. 144 (1938)	19, 43
United States v. *Clark*, 445 U.S. 23 (1980)	7, 9, 16, 17
United States v. *Kirby*, 74 U.S. (7 Wall.) 482 (1868)	13
United States v. *Lee*, 455 U.S. 252 (1982)	*passim*
United States v. *Security Indus. Bank*, 459 U.S. 70 (1982)	16

Table of Authorities Continued

	Page
United States v. *Seeger*, 380 U.S. 163 (1965)	3
Village of Schaumburg v. *Citizens, Etc.*, 444 U.S. 620 (1980)	22, 35
Wallace v. *Jaffree*, 105 S.Ct. 2479 (1985)	43
Weinberger v. *Salfi*, 422 U.S. 749 (1975)	25
West Virginia State Board of Education v. *Barnette*, 319 U.S. 624 (1943)	18, 19, 44, 45
Wisconsin v. *Yoder*, 406 U.S. 205 (1972)	18, 19, 38, 39, 42
Wooley v. *Maynard*, 430 U.S. 705 (1977)	43

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. I	1

STATUTES:

Social Service Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 *et seq.*	11, 12
American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92 Stat. 469 (1978)	15
Pub. L. No. 97-98, 95 Stat. 1213 *et seq.*	13
95 Stat. 1299	13
5 U.S.C. § 5341(a)(2)(A)(iii)	16
7 U.S.C. § 2011	1, 10, 2a
§ 2015(b)	35
§ 2020(e)	1, 10, 14, 2a
§ 2024(b) and (c)	35
§ 2025(e)	1, 9, 10, 13, 31
18 U.S.C. § 287	35
42 U.S.C. § 601	1, 10, 1a
§ 602(a)(25)	1, 9, 10, 13, 31
§ 1320b-7(a)(1)	10, 13, 31
§ 1986	1, 10, 14, 2a
§ 2000d	1, 10, 14, 2a
62 P.S. § 481	35

RULES:

Fed. R. Civ. P. 52(a)	27
Sup. Ct. R. 10.5	9

Table of Authorities Continued

Page

LEGISLATIVE MATERIALS:

H. R. Rep. No. 95-1309, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 1262 14

S. Rep. No. 93-1356, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 8133 11

120 Cong. Rec. 40323 (1974) 12

41653 12

41809 12

41812 12

122 Cong. Rec. S12597 (1976) 31

127 Cong. Rec. H7578 (daily ed. Oct. 21, 1981) 13

H7606 (daily ed. Oct. 22, 1981) 13

OTHER AUTHORITIES:

Sutherland Statutory Construction § 51.02 (Sands 4th ed. 1984) 15

United States Commission on Civil Rights, *Religion in the Constitution: A Delicate Balance* (1983) 14

A. Tocqueville, *Democracy in America* (J. Mayer & M. Lerner 1966 ed.) 45

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first amendment to the United States Constitution, U.S. Const. Amend. I, provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

The pertinent text of Section 402(a)(25) of the Social Security Act, 42 U.S.C. § 602(a)(25) and Section 16(e) of the Food Stamp Act of 1977, 7 U.S.C. § 2025(e) is set forth in the *Jurisdictional Statement* ("J.S.") at pages 1-3, and the *Brief for the Appellants* ("App. Br.") at pages 2-3.

The pertinent text of the following statutory provisions is set forth in the appendix to this brief: 42 U.S.C. §§ 601 and 2000d; 7 U.S.C. §§ 2011 and 2020(e); and The American Indian Religious Freedom Act, 42 U.S.C. § 1996.

STATEMENT

The issue in this case is whether appellees' concededly sincere religious objection to furnishing a social security number ("SSN") for their daughter, Little Bird of the Snow, as a condition for her receipt of federal benefits entitles them, through statutory provisions or the free exercise clause, to an exemption from this otherwise generally applicable regulation. The precise constitutional question before the Court is whether enforcement of the SSN requirement, in cases such as this, is necessary to serve a compelling governmental interest that cannot be furthered in ways less restrictive of appellees' free exercise of religion.

1. Appellees' Beliefs.

The government concedes that appellees' beliefs are religious in nature, and are sincerely held. Thus, appellees' beliefs are not at issue here.[1] Nevertheless, the government's

---

[1] Roy's heritage, beliefs, and the manner in which appellees' family adheres to Native American beliefs and practices are explained in detail at pages 3-9 of Appellees' Motion to Affirm.

repeated denigration of those beliefs requires a brief summary of their origin and centrality.

Appellee Stephen J. Roy is a Native American descended from the Abenaki Tribe. Finding of Fact 1-2, J.S. 2a; J.A. 67-68. Although not raised as a Native American (J.A. 71), in approximately 1972 Roy began to become aware of Native American traditions and beliefs. J.A. 76. Roy studied the religious teachings of Native American "holy people." J.A. 76. Roy also developed his beliefs from native legend, tradition and intuition. J.A. 72-73, 76-77, 125.

Abenaki religious tradition holds that control over one's life is essential to spiritual purity and indispensable to "becoming a holy person." Finding of Fact 30, J.S. 4a. By purifying one's spirit, one may obtain greater spiritual power (J.A. 63), and be protected from evil. J.A. 74. In 1990, Roy heard an Abenaki chief caution that technology was "robbing the spirit of man" (J.A. 77), and stress the importance of preparing one's children for greater spiritual power. J.A. 79.

Preparation for greater spiritual power begins at birth (J.A. 79), and therefore appellees have endeavored to purify the spirit of Little Bird of the Snow since she was born. Roy had the hospital save her placenta, and he buried it to lay a spiritual rest. J.A. 79. At that time, a goshawk rose out of the ground, thus Roy named his daughter Little Bird of the Snow—a name which provided her a "spiritual ally to be used in her life to protect her from evil." J.A. 80.

In order to prepare Little Bird of the Snow for greater spiritual power, appellees must keep her person and spirit unique. J.A. 65. This uniqueness requires control over all aspects of her personality. Finding of Fact 30, J.S. 4a; J.A. 109. Roy sincerely believes that the uniqueness of the SSN as an identifier, coupled with the widespread use of the number, over which she has no control, will serve to "rob the spirit" of Little Bird of the Snow, and prevent him from preparing her for greater spiritual power. Findings of Fact 27 and 34, J.S. 4a and

7a; J.A. 108-109, 111-112, 122, 130.[3] Appellee Karen Miller, Mr. Roy's wife and the mother of Little Bird of the Snow, shares this belief. Comprehensive Statement of Undisputed Facts[5] ("Undisputed Facts") 61, J.A. 18; App. Br. 4, n.2. Appellees' objection to the use of the SSN is consistent with, and supported by, the religious teachings of Native Americans in general. Finding of Fact 32, J.S. 5a; J.A. 164.[6]

The record makes clear that appellees' objection to the use of the SSN cannot be accommodated; to do so would shatter the very foundation of their beliefs. Once widespread use of the

---

[3] The government notes that Roy, Miller and their oldest daughter, Rowan, all have SSNs. App. Br. 4. Roy testified that he obtained these SSNs before he developed his religious objection, and that by the time he did so, the harm from the SSN had been done. J.A. 97-98. The fact that Roy permitted the use of his and Rowan's SSNs before he arrived at his religious understanding has absolutely no bearing on either the religious nature of his beliefs or the sincerity with which he holds them. *Callahan v. Woods*, 658 F.2d 679 (9th Cir. 1981), *on remand*, 559 F. Supp. 163 (N.D. Cal. 1982), *rev'd*, 736 F.2d 1269 (9th Cir. 1984); *Stevens v. Berger*, 428 F. Supp. 896 (E.D.N.Y. 1977).

[5] The rules of the district court require counsel, prior to trial, to attempt in good faith to agree insofar as possible to a comprehensive statement of undisputed facts.

[6] While the religious nature of Roy's beliefs is not at issue, the standard for determining whether or not a particular belief or set of beliefs is religious should be borne in mind. In determining whether appellees' beliefs are religious, a court may not question the truth or falsity of the beliefs. *United States v. Seeger*, 380 U.S. 163, 184-85 (1965); *United States v. Ballard*, 322 U.S. 78, 86-87 (1944). To be protected, appellees' religious beliefs need not be consistent, logical or acceptable to others. Indeed, a belief may be religious notwithstanding the fact that it is not shared by all members of a religious sect, or is even "rank heresy to followers of the orthodox faiths." *Ballard*, *supra*, 322 U.S. at 86 (1944); *Thomas v. Review Board*, 450 U.S. 707, 715-716 (1981).

SSN occurs.[5] Little Bird of the Snow will have lost control over her spirit, and appellees will be powerless to undo the harm. *Finding of Fact* 33, J.S. 5a; J.A. 87-88, 109, 115. In short, if the SSN is used appellees will be unable to prepare their youngest daughter for greater spiritual power. *Id.* For these reasons, and because it is a central part of their beliefs that their children must make their own decisions (J.A. 81, 114-115), appellees sincerely believe that they must maintain Little Bird of the Snow's spiritual purity until such time as she can make an intelligent decision whether or not to permit the use of a SSN. *Finding of Fact* 31, J.S. 4a; J.A. 112, 114-115.

The government does not dispute that appellees' objection to the SSN is founded upon sincerely held religious beliefs. App. Br. 29; J.S. 14-15. Similarly, it does not question that by requiring appellees to violate their beliefs as a condition of receiving welfare benefits, the SSN requirement places a burden upon their free exercise of religion. J.S. 22a; *Thomas v. Review Board*, 450 U.S. 707, 716-18 (1981); *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963). What the government does dispute is the availability of a less restrictive alternative to the requirement. That the government's interests can be served without providing a SSN for Little Bird of the Snow, or other religious objectors, was proven at trial by the testimony of the government's own witnesses (*see infra*, 26-27, and the district court so found. *Findings of Fact* 77 and 85, J.S. 9a and 10a, 22a.[6]

---

[5] The government observes that Roy does not object to all numbers. App. Br. 6. This is because no other numbers are used as permanently as the SSN. As already explained, *supra*, pp. 1-3, it is appellees' belief, it is the widespread use of the SSN which will rob his daughter of greater spiritual power.

[6] Much of the government's Statement, including its assertion that "a numerical system of identification [is] essential to effective operation of countless government programs, including those at issue in this case" (App. Br. 17), is based upon the affidavits of government employees submitted in support of its unsuccessful motion for summary judgment. As the district court explained, because one "can't cross-examine an affidavit" (J.A. 62), these affidavits were not part of the record upon which the court based its decision, and provide no support for the government's position.

2. Facts Concerning The Government's Ability To Further Its Interests Without The SSN.

The evidence presented at trial clearly supports the district court's finding of fact that the file on a particular recipient of welfare benefits can be identified, and informational cross-matching reliably performed, if the recipient's full name, date of birth and parents' names are entered into the government's computerized systems (Finding of Fact 75, J.S. 9a), and disproves the government's contention here that the SSN is indispensable to computerized administration of the welfare system, confirming eligibility and preventing fraud and overpayment. The court also specifically found that certain computer systems used by the government permit the entry of additional information to identify a particular recipient, including SSNs of the recipient's parents, and the recipient's place of birth. Finding of Fact 76, J.S. 9a. Roy has agreed to provide his own SSN to help identify Little Bird of the Snow. Findings of Fact 79 and 79, J.S. 9a; J.A. 92-93.

Insofar as information needed to identify Little Bird of the Snow is concerned, the evidence shows that her name and birthdate are already in the data banks of the government's computers. Finding of Fact 80, J.S. 9a. Significantly, there are no other persons named Little Bird of the Snow whose names have been entered into the government's computers. Finding of Fact 81, J.S. 9a. Even if others shared her name, information on Little Bird of the Snow could be located without the use of a SSN. Finding of Fact 82, J.S. 9a. Thus, the record reveals that the information needed to reliably identify Little Bird of the Snow is presently available to the government and can be, indeed has been,[7] utilized by the government to effectively

---

[7] It is undisputed that, for over nine months prior to the commencement of this action, the government provided welfare benefits to appellees without using a SSN for Little Bird of the Snow. Undisputed Facts 13-19, J.A. 16; Findings of Fact 34-40, J.S. 8a. Moreover, at trial, Bruce Hanger, a supervisory computer systems analyst with the Social Security Administration (J.A. 101), and a witness for the government, testified that the Social Security Admin-

administer welfare benefits to appellees. Exempting Little Bird of the Snow from the SSN requirement "would require no modification to the [government's] computer systems, would require at the most some minor extra expenditure of time by the [government's] employees and would require no discrete financial expenditure." Finding of Fact 84, J.S. 9a.

Contrary to the government's assertion (App. Br. 18), the court did not limit its analysis to the effect of granting an exemption in this particular case. The court specifically found that the interests served by the SSN requirement would not be affected by exempting other religious objectors. J.S. 19a-21a. The evidence indicated that only a handful of persons are likely to request exemptions, and that such persons can be identified by computer in the same manner as Little Bird of the Snow. *Id.* The district court therefore concluded that the government's interest in maintaining an efficient and fraud resistant system may be satisfied without requiring a SSN for religious objectors. Findings of Fact 77 and 80, J.S. 9a and 10a, 23a.

Concluding that the SSN requirement violates appellees' constitutional rights, the district court entered an order enjoining the government from using the SSN established, but not used for Little Bird of the Snow,[8] until December 20, 1990,

---

istration was able to search and locate information in its files for Little Bird of the Snow without a SSN, based solely upon her name and birthdate. J.A. 442-443.

[8] Appellees were never aware that an application for a SSN had been submitted on behalf of Little Bird of the Snow. Indeed, the only explanation for the establishment of a SSN is that Karen Miller vaguely recalled signing a *sheaf of papers* immediately following a long and difficult labor when Little Bird of the Snow was born. Apparently, a SSN application was among those papers. Mr. Bay was not present when the papers were signed, and first became aware of the SSN when he received a card from the Social Security Administration in the mail. He returned the SSN card to the Social Security Administration, together with a letter informing them that he objected on religious grounds to the use of the SSN. The Social

Little Bird of the Snow's 16th birthday. J.S. 22a, 24a-25a; J.A. 87. At that time, Little Bird of the Snow will be able to make her own decision about the use of a SSN.[9] The government took a direct appeal to this Court. J.S. 27a.

SUMMARY OF ARGUMENT

There are three separate and distinct arguments, each equally compelling, as to why the district court's order should be affirmed.

First, the decision below may be affirmed on statutory grounds. The statutes which generally require a SSN as a condition of receiving welfare benefits should be construed to exempt religious objectors to fulfill the plain purposes of the AFDC and Food Stamp programs, namely, to distribute public funds, without discriminating on the basis of religion or national origin, to needy families. Such a construction is required by explicit statutory provisions barring religious discrimination in the awarding of welfare benefits, and specifically prohibiting religious discrimination against Native Americans. Finally, since there is no evidence that Congress was aware of religious objectors to the SSN, much less intended to deny them exemptions, the statutes ought to be construed to avoid constitutional problems. *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *United States* v. *Clark*, 445 U.S. 23 (1980).

Security Administration informed Roy that the SSN would remain dormant until Little Bird of the Snow decided whether she wished to use the SSN, and that it might be withdrawn at some future time. J.A. 464-466. The district court expressly found that the SSN has not been used. Findings of Fact 26 and 33, J.S. 4a and 5a.

[9] The date of Little Bird of the Snow's 16th birthday was also chosen because, as the government's witnesses conceded, she will not earn wages, which might affect appellees' eligibility for Food Stamp and Aid to Families with Dependent Children ("AFDC") benefits, until she reaches the age of 16. J.A. 243-242, 360, 458. The only income she could possibly receive is interest earned from bank accounts, which can be ascertained without the use of a SSN. J.A. 458.

Second, under the facts of the instant case, the government's interest in preventing fraud and overpayment, and in promoting administrative efficiency, is not compelling. *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

Third, the government's interest can be satisfied by means which are less restrictive of appellees' religious beliefs. The testimony of the government's own witnesses amply supports the district court's findings of fact that, even if appellees and other likely religious objectors are afforded welfare benefits without providing a SSN, the government may continue to reliably verify and process their claims by computer, without modification to the government's computer programs or expenditure of public funds.

The government's proposed "programmatic interest" analysis ignores the actual effect of exempting only appellees and others likely to hold a religious objection to the SSN requirement. Instead the government asks the Court to consider an entirely hypothetical situation—the effect of exempting each and every applicant for welfare benefits from the SSN requirement. This argument flies in the face of the Court's analysis in free exercise and speech cases. The government's claim that its interest in the uniform application of laws justifies infringement of religious liberty must be rejected, for it supplants the fundamental principle that the majority may not, by legislation, invade the constitutional rights of the minority.

Finally, the district court's injunction preventing the government from disseminating the SSN for Little Bird of the Snow is entirely proper. In a claim never raised before the trial court, the government asserts that, because appellees are "mere witnesses" to government action, it may disseminate a SSN for Little Bird of the Snow if appellees apply for benefits, even if the SSN requirement violates their religious beliefs. This bizarre argument must be rejected because it forces appellees to either forego benefits, or forfeit their religious beliefs.

ARGUMENT

I. EXEMPTING APPELLEES FROM THE SSN REQUIREMENT IS CONSISTENT WITH CONGRESS' INTENT TO PROVIDE WELFARE BENEFITS TO THE NEEDY WITHOUT VIOLATING THE RELIGIOUS BELIEFS OF BENEFIT RECIPIENTS.

Although the government urges this Court to rush to constitutional judgment, the decision below may be affirmed on statutory grounds. Construing the statutes here involved to avoid the constitutional question starkly posed by prior decisions is fully consistent with the congressional intent in the benefits statutes and other measures pertinent here. Moreover, since there is no indication whatsoever that Congress has focused on, much less rejected, the possibility of claims like appellees', a limiting construction here is entirely appropriate.

The government's entire argument is based upon the flawed premise that Congress *intended* to deny AFDC benefits and food stamps to appellees who, although satisfying the dependency and financial eligibility requirements and supplying their own social security numbers, refused on religious grounds to provide a social security number for their two-year-old daughter.[10] However, Congress has neither expressly

---

[10] The district court did not address whether 42 U.S.C. § 602(a)(25) and 7 U.S.C. § 2025(e) could be construed to permit religious exemptions, as a matter of statutory, rather than constitutional law, although appellees alleged that denial of welfare benefits to Little Bird of the Snow violated Congress' intent. Complaint ¶¶ 17, 18, 26 and 27; J.A. 49. Nonetheless, it is appropriate to determine whether affording welfare benefits to Little Bird of the Snow without her SSN is consistent with the intent of Congress before considering whether such a result is mandated by the Constitution. *United States v. Clark*, 445 U.S. 23, 27 (1980) ("Where both a constitutional issue and an issue of statutory construction are raised, we are not, of course, foreclosed from considering the statutory question merely because the lower court failed to address it."); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). *See also* Supreme Court Rule 10.5

stated that religious exemptions from the SSN requirement should not be permitted, nor left any legislative history indicating that the possibility of an exemption from the SSN requirement for religious objectors was considered and rejected. Since denial of the exemption would violate several policies which Congress has specifically sought to further, it should be granted as a matter of statutory law.

The government relies solely upon Congress' general provision requiring "each" applicant for, or recipient of, AFDC and food stamps to supply a SSN as a condition of receiving benefits. 42 U.S.C. §§ 602(a)(25) and 1320b-7(a)(1); 7 U.S.C. § 2025(e). The government interprets literally the term "each" in order to conclude that Congress intended to bar those with religious objections to the SSN from receiving welfare benefits, regardless of financial need. This construction not only contravenes significant other statutory provisions, but also departs markedly from the approach this Court has taken when construing statutes to preserve first amendment rights.

A. The government's construction of the general SSN requirement violates the "well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of that statute." *Bob Jones University* v. *United States*, 461 U.S. 574, 586 (1983); *Philbrook* v. *Glodgett*, 421 U.S. 707, 713-14 (1975). Here, literal construction would result in depriving eligible indigents of essential public benefits. Contrary to the import of the government's position, the purpose of the AFDC and Food Stamp programs obviously is not to require social security numbers. Congress established these welfare programs to ensure (1) that public funds would be distributed to families who cannot otherwise meet the necessities of life, and (2) that such funds be distributed without discrimination on the basis of religion or national origin, especially with respect to Native Americans. 42 U.S.C. §§ 601, 1996, 2000d; 7 U.S.C. §§ 2011, 2020(c). Appendix 1a-2a. Indeed, the government concedes that the SSN is merely an

"informational requirement," rather than a substantive requirement, of the AFDC and Food Stamp programs. App. Br. 40. Denial of welfare benefits for Little Bird of the Snow, solely because of her parents' refusal to provide her SSN, defeats the express substantive purposes of the AFDC and Food Stamp programs.

It is undisputed that appellees satisfy the need and dependency requirements for AFDC benefits and food stamps, and that denying welfare benefits for Little Bird of the Snow will render her parents financially incapable of providing sufficient food, medical care and other necessities of life. Findings of Fact 44, 51 and 86, J.S. 6a and 7a, 10a; Undisputed Facts 25 and 33, J.S. 15 and 16. During the period of time that cash and medical assistance under the AFDC program had been terminated because of appellees' refusal to provide a SSN for Little Bird of the Snow, the Roy family survived on less than $100 a week to meet all their needs beyond rent. J.A. 96-96. Appellees were unable to obtain enough food for the family, even after seeking relief from private charitable agencies. J.A. 96-97. Were food stamps for Little Bird of the Snow also terminated, even more severe consequences to the health and welfare of appellees' children would ensue.

Congress, by enacting the SSN requirement, did not intend to alter the central goal of affording AFDC and food stamps to the poor. Indeed, the SSN pre-condition was originally introduced into the AFDC program as part of a comprehensive effort to guarantee the right of children to have their absent fathers identified and provide needed financial support. Social Service Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 *et seq.*; S. Rep. No. 93-1356, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 8133, 8146, 8152. Ironically, the government here proposes to employ the SSN requirement to deprive Little Bird of the Snow of essential financial support where her father not only is present, but is striving to preserve her fundamental rights.

None of the proponents of the SSN requirement ever argued that a failure to supply the child's social security number should

lead to the Draconian results which follow from the government's construction of the statute. In fact, Congressman Ullman, a key proponent of Pub. L. No. 93-647, gave the following assurance that no penalty would befall the family which failed to assist the State in finding an absent parent, precisely because the purpose of the act was to obtain support for destitute children:

> Ms. ARZUG: Is there a requirement that will cause a woman to lose her rights to payment if it is determined that she has not 'cooperated' in finding the runaway father? After all, the ADC is supposed to protect the child. Will this deprive children of support they desperately need and have no place to get it? Why did the conference adopt such a provision?
>
> Mr. ULLMAN: I would advise the gentlewoman that the children get the payments anyway. We are not depriving the child at all of the payments under this provision.

120 Cong. Rec. 41808 (1974).[11]

---

[11] Ms. Abzug also received assurances from Representative Pettis that mothers would not be deprived of benefits for failure to cooperate in locating runaway fathers. 120 Cong. Rec. 41812 (1974). The government's construction is also fundamentally at odds with the motivation of those in the Senate who believed that Pub. L. No. 93-647 would, in the words of Senator Mondale, one of the sponsors, have the effect of "strengthening family life." *Id.* at 41655. This would result, as Senator Long, the conference manager, pointed out, because the law's support collection system (of which the SSN was a part) would deter fathers "from deserting their families to welfare and children will be spared many of the effects of family break-up." *Id.* at 40822. Plainly, denial of benefits where, as here, the father is present, and has supplied his own SSN, defeats the original purpose of the SSN requirement, as well as the overall purpose of the AFDC and Food Stamp programs.

It was not until 1981 that Congress made use of the SSN in the Food Stamp program mandatory rather than optional. Pub. L. No. 97-98, 95 Stat. 1213 *et seq.* There is no floor debate on this particular change, which merely required the substitution of the word "shall" for "may." *See* § 1327 of the Act, 95 Stat. 1299. This is not surprising, in light of the fact that the 1981 Act was largely concerned with establishing price support mechanisms for particular farm commodities. Yet even the limited debate on the food stamp program makes clear that Congress' entire concern focused on preventing abuse of the program without depriving assistance for those with legitimate need. These sentiments are best illustrated by the remarks of Congressman Richmond:

> It is damaging for the American people to confuse the 22 million needy Americans, who depend on food stamps for their very survival, with criminals and irresponsible public officials, whose behavior undermines the integrity of the food stamp program.

127 Cong. Rec. H7576 (daily ed. Oct. 21, 1981). *See also* remarks of Congressman Weiss, *id.* at H7606 (daily ed. Oct. 22, 1981).

The purposes of the AFDC and Food Stamp programs may be fulfilled then, only by construing the general terms of 42 U.S.C. §§ 602(a)(25) and 1320b-7(a)(1), as well as 7 U.S.C. § 2025(e), to exempt persons harboring sincere religious objections to the SSN. Such a construction is consistent with this Court's admonition that:

> [A]ll laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

United States v. *Kirby*, 74 U.S. (7 Wall.) 482, 486 (1868), *quoted in I.N.S.* v. *Phinpathya*, 464 U.S. 183, 190 (1984) (Brennan, J.,

concurring); *see also Rector, Etc., of Holy Trinity Church v. United States*, 143 U.S. 457, 465 (1892).

B. The government also fails to address the fact that denial of benefits to Little Bird of the Snow, solely because of her parental religious objection to the SSN asserted on her behalf, squarely contravenes the express intent of Congress to bar discrimination in the awarding of welfare benefits on the basis of religion or national origin. 42 U.S.C. § 2000d; 7 U.S.C. § 2020(c), both of which are set forth in the Appendix.

Congress has manifested particular concern about discrimination against religious beliefs of persons, who, like the Roy family, are Native Americans. In the American Indian Religious Freedom Act, 42 U.S.C. § 1996, Congress provided:

> On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

The legislative impetus behind this policy, the historic infringement of the rights of traditional Native Americans, was summarized in the report of the House of Representatives as follows:

> Lack of knowledge, unawareness, insensitivity, and neglect are the keynotes of the Federal Government's interaction with traditional Indians' religions and cultures. This state of affairs is enhanced by the perception of many non-Indian officials that because Indian religious practices are different than their own that they somehow do not have the same status as a 'real' religion.

H.R. Rep. No. 95-1308, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 1262, 1263; *see also* United States Commission on Civil Rights, *Religion in the Constitution: A Delicate Balance* 27-30 (1983).

The preamble to the American Indian Religious Freedom Act expressly recites that "the lack of a clear, comprehensive, and consistent Federal policy has often resulted in the abridgment of religious freedom for traditional American Indians" and that "such religious infringements result from the lack of knowledge or the insensitive and *inflexible enforcement of Federal policies and regulations* . . . ." American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92 Stat. 469 (1978) (emphasis supplied). Denial of welfare benefits to Little Bird of the Snow Bay, in the interest of uniformity, perpetuates the very evil the Act was designed to eradicate.

It is a fundamental tenet of statutory construction that statutes relating to the same subject matter, "although in apparent conflict, are construed to be in harmony if reasonably possible." *Sutherland Statutory Construction* § 51.02 (Sands 4th ed. 1984); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-34 (1974). Contrary to this principle of construction, the government interprets the SSN requirement to override Congress' prohibition of discrimination in the awarding of welfare benefits, as well as the express policy of the United States to protect the free exercise of Native American religious beliefs. But there is no evidence whatever that Congress intended to give the SSN priority over the underlying purpose of the benefit programs and the goal of nondiscrimination. A reading construing the SSN requirement to exempt religious objectors in the position of appellees would vindicate Congress' ban on discrimination, without undermining the intent of the SSN requirement, because the purposes served by the requirement can be satisfied without requiring religious objectors to provide a SSN. *See* pp. 5-7, *supra*, pp. 26-27, *infra*.

C. The government's construction of the SSN requirement similarly violates the settled rule that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). This Court has demanded a showing of "the affirmative intention of the Con-

gress clearly expressed" before accepting a construction of a statute which would present a serious constitutional question. *Id.* at 501; *United States* v. *Security Indus. Bank*, 459 U.S. 70, 82 (1982). *Cf. TWA* v. *Hardison*, 432 U.S. 63 (1977) (construing religious discrimination provisions of Title VII in way which avoided constitutional problem later focused upon in *Estate of Thornton* v. *Caldor*, 105 S.Ct. 2914 (1985)).

This Court was presented with an analogous situation in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), which involved a challenge to the National Labor Relations Board's exercise of jurisdiction over lay faculty members at parochial high schools. Although the Court found the language defining the Board's jurisdiction broad enough to extend to church-operated schools (*id.* at 504), it recognized that such a construction would give rise to a serious question whether the statute violated the religion clauses of the first amendment. Applying the rule that a statute should not be construed to violate the Constitution if any other construction is possible, the Court refused to blindly apply the literal terms of the grant of jurisdiction and proceeded to examine the legislative history. The Court found that Congress had simply given no consideration to Board jurisdiction over church-operated schools. *Id.* Because there was "no clear expression of an affirmative intention of Congress" to extend NLRB jurisdiction to such schools (*id.*), the Court declined to so construe the statute, thereby avoiding the constitutional question.

This Court similarly refused to construe a federal statute so as to preclude individuals from receiving public benefits without specific legislative consideration in *United States* v. *Clark*, 445 U.S. 23 (1980). The Civil Service Retirement Act permitted stepchildren or recognized natural children under 18 to recover a survivor's annuity only if they "lived with the employee . . . in a regular parent-child relationship." 5 U.S.C. § 8341(a)(3)(A)(iii). The government contended that the statute excluded children born out of wedlock who were not living with the federal employee at the time of his death. Since the govern-

ment's construction would require the Court to rule whether the statute unconstitutionally discriminated against illegitimates, the Court proceeded to first determine whether a construction of the statute avoiding the constitutional question was possible.

The government claimed that Congress intended to limit benefits to recognized natural children who lived with the federal employee at the time of his death in order to (1) eliminate fraudulent claims of dependency, and (2) promote the efficient administration of the retirement program by permitting prompt identification of eligible beneficiaries. 445 U.S. at 30. After reviewing the legislative history, this Court concluded that Congress had never discussed whether to so limit annuities. Absent evidence of Congress' intent to extend the statute to circumstances which created the constitutional problem, the Court refused to literally construe the phrase "lived with the employee in a regular parent-child relationship" to exclude recognized natural children who were not residing with the employee at the time of his death.[12]

As in *NLRB* v. *Catholic Bishop of Chicago* and *United States* v. *Clark*, Congress never considered whether to exempt religious objectors when it conditioned receipt of AFDC benefits and food stamps upon providing a SSN. This is hardly surprising in face of the undisputed fact that only four persons, other than appellees, have lodged religious objections of any nature to the SSN. Finding of Fact 83, J.S. 9a; 18a; Undisputed Fact 64, J.A. 19. Because there is no "affirmative intention of

---

[12] This Court's decision in *Clark* further undercut the government's asserted need for a uniform and convenient mechanism to prevent fraud, and promote administrative efficiency in the identification of eligible applicants, essentially the same justifications offered for the SSN requirement in the present case. The fact that the government in that instance was required to devote time and resources to consider documentary evidence concerning eligibility was found not to override the interest in avoiding potential constitutional infirmities. 445 U.S. at 34.

the Congress clearly expressed" to deny benefits to otherwise eligible persons who cannot provide a SSN because of sincere religious beliefs, this Court should construe the statutes enacting the SSN requirement to exempt religious objectors. Such a construction is not only consistent with statutes barring discrimination, but fulfills the intent of Congress in establishing the AFDC and Food Stamp programs.

II. THE SSN REQUIREMENT, AS APPLIED IN THIS CASE, VIOLATES APPELLEES' RELIGIOUS BELIEFS BECAUSE IT DOES NOT SERVE A COMPELLING GOVERNMENTAL INTEREST.

The right to freely exercise one's religious beliefs, which includes the religious upbringing of one's children, always has occupied an elevated status in American society. *Wisconsin* v. *Yoder*, 406 U.S. 205, 213-14 (1972); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) ("Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its furthest reaches"); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925). From the founding of the republic, it has been accepted that one's religious obligations are generally superior to his obligations to civil society.[13] While

---

[13] In his 1875 "Memorial and Remonstrance Against Religious Assessments" in Virginia, reprinted as an appendix to Justice Rutledge's dissenting opinion in *Everson* v. *Board of Education*, 330 U.S. 1, 64-65 (1947), James Madison wrote:

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. . . . [I]n matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.
>
> * * *
>
> 2. Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former.

This Court has looked to the Virginia experience with religious

religious freedom is not absolute, it may be restricted "only to prevent grave and immediate danger." *Barnette*, 319 U.S. at 639; *accord*, *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963).

Accordingly, a government regulation which infringes religion may not be justified merely by showing a rational relationship between the regulation and a legitimate governmental interest. Rather, in order to justify interference with the free exercise of an individual's religious beliefs, the government bears the burden of proving both (1) a compelling governmental interest, and (2) that this compelling interest cannot be satisfied by means which are less restrictive of the individual's religious beliefs. *Bob Jones University* v. *United States*, 461 U.S. 574, 604 (1983); *Thomas* v. *Review Board*, 450 U.S. 707, 718 (1981); *Wisconsin* v. *Yoder*, 406 U.S. 205, 213-14 (1972); *Sherbert* v. *Verner*, 374 U.S. 398, 406-407 (1963).[14]

---

freedom as "particularly relevant in the search for the First Amendment's meaning." *McGowan* v. *Maryland*, 366 U.S. 420, 437 (1961); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 770 (1973); *Everson* v. *Board of Education*, 330 U.S. 1, 9 (1947).

[14] The government suggests, without citation to any authority, that the Court must presume the SSN requirement to be constitutional. App. Br. 27. This suggestion simply is not correct. *Harris* v. *McRae*, 448 U.S. 297, 312 (1980), *quoting Mobile* v. *Bolden*, 446 U.S. 55, 76 (1980) ("It is well settled that, quite apart from the guarantee of equal protection, if a law 'impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional' "); *Speiser* v. *Randall*, 357 U.S. 513, 520 (1958); *Prince* v. *Massachusetts*, 321 U.S. 158, 173 (1944) (Murphy, J., dissenting); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938). Similarly, the government's assertion that the SSN requirement is of general application and neutral on its face (App. Br. 34), does not alter its burden of establishing that the requirement serves a compelling governmental interest which cannot be satisfied by means less restrictive of appellees' religious belief. *Thomas* v. *Review Board*, 450 U.S. 707, 717 (1981); *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972); *Gillette* v. *United States*, 401 U.S. 437, 462 (1971); *Sherbert* v. *Verner*, 374 U.S. 398, 404-05 (1963); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115 (1943).

The government does not dispute that this is the governing legal standard, and was applied by the district court. App. Br. 28. Perhaps recognizing that the SSN does not serve a compelling interest, the government erroneously contends that "[t]he dispute in this case . . . turns on the 'least restrictive means' aspect of the inquiry." App. Br. 29. Although the court below found the SSN to serve a compelling interest, appellees challenged this fact at trial (J.S. 31), and in their Motion to Affirm in this Court. Motion to Affirm, 10-14. While the government fails to address the issue, the judgment of the district court may be affirmed on the ground that the interests served by the SSN requirement are not compelling.

The government asserts that the SSN serves two basic purposes: (1) to prevent improper disbursement of welfare funds as a result of fraud and overpayment, and (2) to facilitate the administration of welfare programs through computerization. App. Br. 10-11, 27. While appellees maintain that those purposes can be met without requiring a SSN for religious objectors, *see* 26-37, *infra*, this Court need not reach this issue. For the relevant precedents of the Court establish that while the goals of the SSN requirement are admittedly legitimate, they are not compelling and thus cannot justify the conceded infringement of appellees' religious beliefs.

A. The Risk Of Fraud And Overpayment From Accommodation Of The Religious Exemption Sought Here Does Not Present A Compelling Governmental Interest.

This Court has consistently held that the risk of erroneous payment of welfare benefits is not one of the "gravest abuses, endangering paramount interests," *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963), *quoting Thomas* v. *Collins*, 323 U.S. 516, 530 (1945), which will justify governmental interference with an individual's sincerely held religious beliefs. In *Sherbert*, a member of the Seventh-Day Adventist Church was denied unemployment compensation because she would not work on Saturday, the Sabbath day of her religion. After holding that denial of these welfare benefits imposed a burden on the free

exercise of Sherbert's religion, by forcing her to choose between foregoing unemployment compensation or abandoning her religious beliefs, this Court ruled that the risk of diluting the unemployment compensation fund was not the kind of "substantial threat to public safety, peace or order" (*id.* at 403), that was compelling within the meaning of the constitutional text. This Court specifically observed that the likelihood of feigned religious objections hypothesized by the state was belied by the record, which indicated that only one other Seventh-Day Adventist had failed to find a job which did not require work on Saturday. 374 U.S. at 399, n.2.

In *Thomas* v. *Review Board*, 450 U.S. 707 (1981), this Court again refused to find that protection of welfare funds warrants infringement of an individual's free exercise of religion, concluding that the state's interest (analogous to that at issue in *Sherbert* and here) was not "sufficiently compelling to justify the burden upon Thomas' religious liberty." *Thomas*, 450 U.S. at 719.[18] In support of its holding, the Court observed that there was no evidence, nor any claim by the state, that the number of persons who hold religious beliefs which would cause them to leave their employ was large enough to seriously affect unemployment, much less create widespread unemployment. *Id.*

This Court likewise has held that the government's interest in the integrity of welfare funds will not justify conditions on the receipt of benefits which infringe other fundamental rights. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 263 (1974) ("The conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the

---

[18] The government concedes that the interest served by the SSN in the present case "is merely an informational requirement" and therefore even less important than the "substantive" requirements to receipt of public benefits which this Court held not to be compelling in *Sherbert* and *Thomas*. App. Br. 40.

right to freely migrate and settle in another State."); *Graham* v. *Richardson*, 403 U.S. 365, 375 (1971) (concern for fiscal integrity is not a compelling interest which will justify discrimination against aliens in the award of welfare benefits); *Shapiro* v. *Thompson*, 394 U.S. 618, 633, 637 (1969) (state's interest in preserving fiscal integrity of AFDC programs as well as preventing fraud is not compelling interest which will support interference with right to interstate travel).[16]

The teaching of these cases is clear. The government's interest in protecting its welfare funds against fraud and overpayment, although of course legitimate, is not itself compelling so as to justify infringement of sincerely held religious beliefs.[17] This is particularly true where here, as in *Sherbert* and *Thomas*, the record demonstrates that there are not likely to be a significant number of religious objections to a condition for receipt of welfare benefits. It is undisputed that only four persons have ever presented religious objections of any nature to the SSN requirement. Finding of Fact 83, J.S. 9a; 18a; Undisputed Fact 64, J.A. 19. In addition, the district court found that the government "presented no evidence that any

---

[16] The Court has also refused to find that the government's interest in preventing fraud will support broad prophylactic interference with first amendment rights of free speech. *Village of Schaumburg* v. *Citizens, Etc.*, 444 U.S. 620, 636-37 (1980); *Torcaso* v. *Watkins*, 367 U.S. 488, 489-90, 495-96 (1961); *Schneider* v. *New Jersey*, 308 U.S. 147, 164 (1939).

[17] The Court has struck a different balance in considering requests for religious exemptions from tax statutes of general applicability. *United States* v. *Lee*, 455 U.S. 252 (1982). As Justice Stevens has explained, claims for exemption to such statutes are analytically different from the context here, since they present significant risk of economically motivated requests for exemption, and therefore a likelihood of numerous requests, with attendant difficulties of administration and evaluation of the merits of religious claims. *See Lee*, 455 U.S. at 263 (Stevens, J., concurring). Here, the likelihood of economically motivated claims is even less than in *Sherbert* and *Thomas*.

more than a handful of people have religious beliefs that would result in a request for exemption from the social security number requirement." J.S. 18(a). Moreover, the district court held that the possibility of defrauding the government by virtue of being exempted from the SSN requirement to be "extremely remote." J.S. 21(a).[18] Hence, the risk of fraud and overpayment from accommodation of the religious exemption sought here does not present a compelling government interest.

B. The Impairment Of Administrative Efficiency From Accommodation Of The Religious Exemption Sought Here Does Not Present A Compelling Governmental Interest.

The government's contention that the SSN is essential to the administration of welfare programs through computerized data systems is without merit. App. Br. 10. The government concedes that information about Little Bird of the Snow can be, indeed has been, entered into its computers without a SSN. Finding of Fact 80, J.S. 9a; Undisputed Facts 57 and 60, J.A. 18. Although it nonetheless contends that the SSN is necessary for comparisons of various files in order to determine the proper level of welfare payments and to prevent fraud, the district court found to the contrary that the absence of a SSN does not affect the government's ability to employ its computers to identify and compare files on welfare recipients. *See* pp. 5-7, *supra* and 26-37, *infra*. Moreover, even assuming that the

---

[18] In its reply brief to Appellees' Motion to Affirm, the government avers its interest is compelling because the record indicates that there is significant fraud and abuse in federal welfare programs. Reply Brief, 4-5. The government misapprehends the proper inquiry. The relevant question is whether the record establishes that the risk of fraud is presented by potential religious objectors to the SSN. There is no evidence that a handful of persons who fail to provide a SSN because of religious beliefs will threaten the integrity of welfare funds. On the contrary, the fraud which exists in the welfare system is being perpetrated by persons who willingly supply a SSN. Plainly the SSN is not the infallible means of detecting fraud which the government posits. *See* pp. 29-32, *infra*.

government was unable to utilize its computers absent a SSN, the interest in avoiding the expenditure of clerical time to compare the files of a handful of persons harboring religious objections to the SSN plainly is not compelling.

Contrary to the government's assertion that "the individual's interest in religious liberty must yield to the greater interest of society in the efficient and effective administration of its welfare programs" (App. Br. 27), administrative efficiency has never been held sufficiently compelling to justify the abridgement of individual liberties. In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), the Court held unconstitutional an Illinois law which made children of unwed fathers wards of the state upon the death of their mother, without individualized hearings to determine whether the fathers were in fact unfit. Rejecting the argument that Illinois need not endure the administrative inconvenience of individual determinations of fitness, this Court explained:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

405 U.S. at 656-57 (footnotes omitted). *See also United States* v. *Lee*, 455 U.S. at 263, n.2 (Stevens, J., concurring) (stressing that result in *Lee* rests not on "administrative convenience" but on avoidance of creating bureaucracy to resolve economically motivated claims); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 647 (1974) ("administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law."); *Frontiero* v. *Richardson*, 411 U.S. 677, 690 (1973) ("'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."); *Car-*

rington v. *Rash*, 380 U.S. 89, 96 (1965) ("States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State."); *Speiser* v. *Randall*, 357 U.S. 513 (1958) (California statute which denied property tax exemption to veterans who do not sign loyalty oath in order to relieve tax assessor of burden of ascertaining facts about claimants held unconstitutional); *Martin* v. *City of Struthers*, 319 U.S. 141, 151-152 (1943) (Murphy, J., concurring) ("Freedom of religion has a higher dignity under the Constitution than municipal or personal convenience."); *Schneider* v. *New Jersey*, 308 U.S. 147, 164 (1939) (Ordinance barring distribution of handbills, though an efficient and convenient way of preventing fraud, violates first amendment).[19] As this Court stated in requiring evidentiary hearings prior to termination of AFDC benefits:

> From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within the borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.
>
> • • •
>
> [T]he interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's inter-

---

[19] *See also Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 267 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618, 636 (1969); *Goldberg* v. *Kelly*, 397 U.S. 254, 265-66 (1970) (promoting efficiency in the administration of welfare programs will not justify denial of fundamental constitutional rights of welfare recipients). This Court has acknowledged that while the government's concern with administrative efficiency is not compelling, welfare statutes which promote efficiency *without infringing upon constitutional rights* satisfy the much less demanding standard of "reasonableness" or "rational basis" imposed by the due process clause of the fifth amendment. *Califano* v. *Boles*, 443 U.S. 282 (1979); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975).

> est that his payments *not* be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.

Goldberg v. *Kelly*, 397 U.S. 254, 264-66 (1970) (footnote omitted, emphasis supplied).

III. ACCOMMODATING THE RELIGIOUS BELIEFS OF APPELLEES AND OTHER RELIGIOUS OBJECTORS WOULD NOT UNDULY THREATEN THE INTERESTS SERVED BY THE SSN REQUIREMENT.

The district court held that appellees could prevail on their free exercise claim only if the interests served by the SSN requirement could be fulfilled by "some *reasonable* alternative means" which would not "substantially burden the benefit programs involved in this case by, for example, involving a cost so great that the efficient operation of the programs would be effected [sic] or by creating a substantial likelihood of chaos in the system resulting from a proliferation of claims to exemptions from the requirement." J.S. 16a (emphasis in original).[20] Applying this test as required by prior decisions, the district court first found as a fact that all the interests served by the SSN could be satisfied without requiring appellees to provide a SSN for Little Bird of the Snow. Contrary to the government's brief (App. Br. 18), however, the court did not limit its analysis to this particular case, but went on to examine the impact if other religious exemptions were granted. It found that the purposes of the SSN requirement similarly could be fulfilled if all other prospective religious objectors were exempted. J.S. 18a-21a.

---

[20] In this regard, the test applied by the district court was consistent with that applied in previous cases. *See, e.g., United States* v. *Lee*, 455 U.S. at 259, *quoting Braunfeld* v. *Brown*, 366 U.S. 599, 606 (1961) ("The remaining inquiry is whether accommodating the Amish belief will unduly interfere with fulfillment of the governmental interest. . . . Religious beliefs can be accommodated, see, *e.g., Thomas, supra; Sherbert, supra*, but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.' ")

The government attacks the district court's opinion on two grounds. First, it asserts that the court erred in its findings of fact that the functions served by the SSN can be satisfied without requiring appellees to supply a SSN for Little Bird of the Snow. App. Br. 41-44. Secondly, the government contends that the district court erred by considering only potential religious objectors in determining whether there are less restrictive alternatives to the SSN. The government avers that the court was required to examine the effect of exempting *all* AFDC and Food Stamp participants from the requirement. App. Br. 30. Under the government's unprecedented position, unless the purposes of the SSN can be satisfied by a uniform alternative—applicable not only to likely religious objectors but also to *all* persons eligible for the welfare programs involved here—Little Bird of the Snow may not be exempted from the SSN requirement. App. Br. 29-30.

The government's claims of error are meritless.

A. Accommodating Appellees In This Particular Case Would Not Interfere With Any Significant Governmental Interest.

The district court's findings of fact that all the functions served by the SSN can be accomplished in this case without requiring appellees to provide a SSN for Little Bird of the Snow (Findings of Fact 75-82, 84-95, J.S. 8a-10a) are not clearly erroneous as the government suggests (App. Br. 41-44); rather, they are amply supported by evidence from the government's own witnesses.[21]

---

[21] As this Court has recognized, Federal Rule of Civil Procedure 52(a) mandates that the findings of fact of a district court, following a non-jury trial, shall not be set aside unless clearly erroneous, *Rogers* v. *Lodge*, 458 U.S. 613, 622-23 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982), and further specifies that "due regard shall be given to the opportunity of the trial court to judge of [sic] the credibility of the witnesses." Fed. R. Civ. P. 52(a); *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 758 (1976) ("It is not our place . . . to reappraise the evidence, unless it plainly fails to support the findings of the trier of facts").

The government submits that Little Bird of the Snow's SSN is necessary to enable it to verify, by computer, any income and other benefits which she may have received. Yet, as the district court observed, the government's own witnesses testified that states can conduct computer matching without a SSN. J.S. 20a. The court found that computer files on recipients of welfare benefits can be identified, and computer matching performed, by utilizing information such as the individual's name, date and place of birth, parents' names and parents' social security numbers. Findings of Fact 75 and 76, J.S. 8a and 9a. All of this information has been supplied to the government by appellees. Findings of Fact 53 and 79, J.S. 7a and 9a. Indeed, it is undisputed that Little Bird of the Snow's name and birthdate have been entered into the computers which the government uses to determine eligibility for welfare benefits. Finding of Fact 80, J.S. 9a; Undisputed Fact 57, J.A. 18.

Hence, the district court found that even if Little Bird of the Snow is exempted from the SSN requirement, the government can continue to perform its computer searches with no modification to the government's computer systems and with no expenditure of additional funds. Finding of Fact 84, J.S. 9a; 19a. In fact, Little Bird of the Snow had received AFDC payments and food stamps for nine months before this action was commenced without providing the SSN which the government maintains is necessary to administer these programs. Findings of Fact 34, 40 and 50, J.S. 5a and 6a. The government "presented no evidence that any harm has resulted." J.S. 19a; J.A. 303, 375, 454-56.[22] In sum, "the Defendants never pointed

---

[22] Plainly the government has been able to verify Little Bird of the Snow's eligibility without her SSN, It stipulated that, except for their refusal to provide a SSN for Little Bird of the Snow, appellees had met all the eligibility requirements for cash and medical assistance, and food stamps at all times since they began receiving those benefits. Findings of Fact 44 and 51, J.S. 6a-7a; Undisputed Facts 25 and 33, J.A. 15 and 16.

out any specific concrete harm that would result if the Plaintiffs prevailed in this case." J.S. 19a.[23]

Although the record clearly establishes that eligibility for welfare benefits can be determined by computer without a SSN, the government contends that SSNs are essential to *reliable* computer searches because, unlike names, they are allegedly unique identifiers. App. Br. 43.[24] This claim is contra-

---

[23] The only computer matching which the government asserts cannot be performed without a SSN would occur when one state seeks information from the files of another state. App. Br. 12. The district court expressly stated that it was not persuaded that such computer searches would be impossible without the SSN. J.S. 20a-21a. Even were interstate matches by computer impossible, the court stated, "the possibility that Little Bird of the Snow or some other individual could fraudulently obtain welfare benefits in two different states or in some other interstate context as a result of exempting Little Bird of the Snow from the social security number requirement in this case is extremely remote." J.S. 21a. In the event that this remote contingency occurred, information from another state's files would have to be obtained by a human being rather than by computer, which the court found "would require at most some minor expenditure of time." Finding of Fact 84, J.S. 9a. The fact that a welfare worker might have to spend time manually verifying eligibility on rare occasions will not justify infringement of fundamental constitutional rights. *Shapiro* v. *Thompson*, 394 U.S. 618, 637 (1969) ("Since double payments can be prevented by a letter or a telephone call, it is unreasonable to accomplish this objective by the blunderbuss method of denying assistance to all indigent newcomers for an entire year.").

[24] There is no dispute that besides appellees' daughter, no other persons named Little Bird of the Snow have had their names entered into the computer used to determine eligibility for welfare benefits. Finding of Fact 81, J.S. 9a; 20a. In fact, there was no evidence that anybody else in the United States share the name Little Bird of the Snow. J.S. 20a.

Despite the conceded uniqueness of the name Little Bird of the Snow, the lower court proceeded to examine the effect upon computer searches if there were other persons of that name. It found that

dicted by the testimony of the government's own witnesses.

The reliability of a computer match is determined by assigning numbers to the various identifiers which are searched, such as name, birthdate, address and social security number. When an identifier in the search request matches that same identifier in the file, a positive number is assigned. When an identifier in the search request does not match the same identifier in the file, a negative number is assigned. The higher the total derived from comparing all identifiers, the more likely it is that the file concerns the individual who is the subject of the search request. J.A. 273-74.

The manual which describes this matching process specifies the numbers attached to each identifier.[25] If the SSN in the search request is the same as the SSN in the file, the match for that identifier receives a positive numerical value of 220. J.A.

"[e]ven if there were other persons in the computer who share her name, information on Little Bird of the Snow could be rapidly located in most if not all of the existing computer systems by searches or comparisons of birthdates and parents' names and addresses." Finding of Fact 82, J.S. 9a; 29a.

[25] In its reply brief to Appellees' Motion to Affirm, the government asserts that this manual is out of date. Reply Brief 4, n.1. The manual was produced by the government at trial after one of its witnesses, Robert Stauffer, a regional computer specialist for the Social Security Administration (J.A. 194), conceded that he had reviewed the manual in preparation for his testimony and had brought it to the courtroom. J.A. 234-35. Mr. Stauffer affirmed that the manual describes the operation of AFDC computer system. J.A. 257. Following a recess during redirect examination, Mr. Stauffer for the first time asserted that the manual was out of date. Mr. Stauffer claimed the manual was drafted prior to the time Congress agreed to raise the federal share of the cost of implementing the computer system in the states from 50% to 90%. J.A. 321. On re-cross examination Mr. Stauffer conceded the preface to the manual expressly provides that it was developed in response to this increase in federal funding. J.A. 332-34. Based on this record, the trial court had ample grounds to reject Mr. Stauffer's belated attempt to disavow the manual.

274. Interestingly, if there is no SSN in either the search request or the file, no points are subtracted. J.A. 317. Far greater value is attributed to name, birthdate and county of residence than to the SSN. When the name and birthdate in the search request are the same as the name and birthdate in the file, the match for these identifiers is assigned the much higher positive numerical value of 494. J.A. 274-75. If the county of residence in the search request is the same as in the file, the match for that identifier alone carries a positive value of 270. J.A. 313-15. A search in which these identifiers (name, birthdate and county of residence) match receives a total value of 764, versus only 220 for the SSN.[25]

---

[25] One reason for this disparity may be that the SSN is not necessarily unique, as persons may readily obtain more than one SSN. *See Stevens v. Berger*, 428 F. Supp. 896, 907 (E.D.N.Y. 1977) ("Admittedly however, the [Social Security] number is not a perfect device, since millions of people are estimated to hold more than one number or to share a number."). Indeed, Congress recognized this fact when it expressly required welfare recipients to "furnish to the State agency their social security account number (or numbers, if they have more than one number)." 7 U.S.C. § 2025(e). *See also* 42 U.S.C. § 602(a)(25) and § 1320b-7(a)(1). A person nevertheless can fraudulently obtain welfare benefits by providing only one of his SSNs. This very prospect was acknowledged by Senator Percy on the floor of the Senate:

> The social security number is not an infallible identifier any more than a passport is. We saw on '60 Minutes' a few weeks ago how easy it is to get all kinds of identification and get it in triplicate and quadruplicate copies whenever one wants to do so.
>
> A person who is willing to apply for benefits to which he or she is not entitled would probably not be reluctant at all to obtain a multiple social security number to avoid detection.
>
> This is a Federal misdemeanor, but wrongful receipt of benefits is also a crime. So it is not an infallible system.

122 Cong. Rec. S12587 (1976).

Moreover, Virgil Conrad, a deputy administrator in the United States Department of Agriculture, who oversees the food stamp program (J.A. 336), testified that entry of the SSN into various computer files "is subject to human error, transposing and situations

That the government persists in asserting that it cannot effectively conduct searches without a SSN is quite remarkable in light of the fact that its own witness, Bruce Hanger, a supervisory computer systems analyst with the Social Security Administration (J.A. 381), recanted this assertion during the trial. Admitting that searches can be performed without the SSN, Mr. Hanger confessed that, in his view, it was improper for the government to withhold benefits from Little Bird of the Snow:

> Q. [by the Court]
>
> Well, why is it proper for the Social Security branch or the Department of Health and Human Services to be withholding any benefits from this little girl if, in fact, that is being done?
>
> A. Are you asking my opinion, sir?
>
> Q. Yes.
>
> A. I don't believe that it is proper.
>
> Q. Well, have you heard testimony in this case that this little girl—
>
> A. Yes.
>
> Q. —has been deprived of benefits for about a year and a half?
>
> A. Yes, sir.
>
> Q. Well, how do you explain that?
>
> A. I explain it because the Social Security number was not provided, and that evidently is a requirement for these benefits.

J.A. 449.

---

as that. . . ." J.A. 352. Entry of names is less subject to human error because the computer has a built-in safeguard: the computer performs what is known as a "soundex" search to ensure no mistake has been made based upon commonalities in sounds of names. J.A. 277.

The government apparently defends its authority to impose any conditions upon what it views as the privilege of receiving welfare benefits. App. Br. 42, J.S. 18, n.12.[27] This Court, however, rejected that proposition as outmoded more than 20 years ago. *Sherbert* v. *Verner*, 374 U.S. 398, 404-405 (1963).

Thus, the testimony of the government's own witnesses provides a firm basis for the district court's findings that all of the interests served by the SSN requirement can be satisfied in this case without compelling appellees to provide a SSN for Little Bird of the Snow.[28]

B. Accommodating Other Religious Objectors To The SSN Requirement Would Not Interfere With Any Significant Governmental Interests.

The district court did not restrict its analysis to assessing whether the interests served by the SSN requirement may be fulfilled if only Little Bird of the Snow were exempted. After examining the effect of excepting all other religious objectors *likely* to seek the accommodation sought here, the court specifically found that such exemptions similarly would not undermine any of the purposes served by the SSN requirement. J.S. 16a; 18a. This finding too is amply supported.

---

[27] The only decision of this Court cited in support of the government's contention (*Schweiker* v. *Hansen*, 450 U.S. 785 (1981); App. Br. 42) is inapposite. *Schweiker* presented the question whether the government was estopped from requiring a written application for welfare benefits from one who failed to submit an application because of a caseworker's erroneous representation that she was ineligible. No constitutional claim was raised.

[28] The government contends that it cannot accommodate appellees' religious beliefs because they object to the use of any information which would identify the family as individuals. App. Br. 43-44. The government misstates appellees' religious beliefs. *See* pages 1-4, *supra*.

It is apparent that just as the government's computers can accurately search for information on Little Bird of the Snow without her SSN, such searches can be conducted for other persons who cannot, for religious reasons, provide a SSN. As the district court found, "[e]ffective cross-matching can be performed on the computer systems currently used by the Defendants when several identifying factors for a particular applicant are typed into the computer, even absent the social security number." J.S. 20a.[29]

In conducting its less restrictive alternatives inquiry, the lower court also assessed the number of persons likely to lodge religious objections to the SSN. Consistent with this Court's approach in *United States* v. *Lee*, the court noted that the government's interests could be held superior to appellees' right to free exercise of their religious beliefs if "a proliferation of claims to exemption from the [SSN] requirement" would create chaos in the welfare system. J.S. 16a. The government conceded that there have been only four other religious challenges to the SSN requirement. Finding of Fact 83, J.S. 9a; 18a; Undisputed Facts 64, J.A. 19. The court further found that the government "presented no evidence that any more than a handful of people have religious beliefs that would result in a request for an exemption from the social security number requirement." J.S. 18a.[30] In light of the fundamental difference

---

[29] In *Stevens* v. *Berger*, 428 F. Supp. 896 (E.D.N.Y. 1977), Judge Weinstein permanently enjoined the United States Department of Health, Education and Welfare from denying welfare benefits to the Stevens family based upon their refusal, on religious grounds, to provide a SSN for their children. Appellees' counsel asked each of the government's witnesses whether exempting the Stevens family had any adverse effect on the administration of the welfare programs. None were aware of any problems or costs which had been incurred. J.A. 305-306, 377, 408-09; J.S. 19a.

[30] The government offered no evidence that religious objections had been registered against any other requirements of the AFDC and Food Stamp programs. Thus the government's cry that there is no

between seeking an exemption from payment of a tax (where the incentive for concocted claims is great) and seeking an exemption from the SSN requirement (where *no* such incentive exists), the court's findings, based upon the evidence before it, are surely insulated from being overturned.[31]

The district court's determination that the welfare programs will not be imperiled if religious objectors are afforded welfare benefits without a SSN, is consistent with the findings of other courts which have considered this issue. *See Stevens* v. *Berger*, 428 F. Supp. 896, 907-08 (E.D.N.Y. 1977) (Weinstein, J.)

---

limit to the number of accommodations which may be demanded (App. Br. 35), is based upon the idle speculation which this Court has never found adequate to justify infringement of first amendment rights. *See* pp. 38-43, *infra*.

[31] Justice Stevens explained why far more persons were likely to seek exemptions from the payment of taxes:

> A tax exemption entails no cost to the claimant; if tax exemptions were dispensed on religious grounds, every citizen would have an economic motivation to join the favored sects. No comparable economic motivation could explain the conduct of the employees in *Sherbert* and *Thomas*.

United States v. *Lee*, 455 U.S. at 264, n.3 (Stevens, J., concurring).

The government argues that granting religious exemptions to the SSN requirement will create an incentive to feign religious objections in order to fraudulently receive benefits. App. Br. 32, n.14. Given the rarity of religious objections to the SSN, persons claiming an exemption are likely to receive greater, rather than lesser scrutiny.

Moreover, because there are significant civil and criminal penalties for welfare fraud, affording religious exemptions to the SSN requirement will not provide any economic incentive to defraud the AFDC and Food Stamp programs. 7 U.S.C. §§ 2015(b) and 2024(b) and (c); 18 U.S.C. § 287; 62 P.S. § 481. This Court has recognized that targeted penalties are constitutionally preferable to broad prophylactic measures as a means of preventing fraud. *Village of Schaumburg* v. *Citizens, Etc.*, 444 U.S. 620, 636-37 (1980); *Cantwell* v. *Connecticut*, 310 U.S. 296, 306 (1940); *Schneider* v. *New Jersey*, 308 U.S. 147, 164 (1939).

(enjoining denial of benefits where there is no proof "that the Stevensons, or those few others who might share their beliefs, pose insurmountable problems if their social security numbers cannot be fed into the maws of welfare computers"); *Callahan v. Woods*, 736 F.2d 1269, 1274-75 (9th Cir. 1984) (absent any *evidence* concerning the number of persons holding religious objections to the SSN requirement or any adverse effect on administrative efficiency, "the district court could not properly have found that exempting Callahan from the SSN requirement would be incompatible with the government's efficient operation of the AFDC program"); *Atwood v. Idaho Department of Health and Welfare*, No. 83-3066 (D. Idaho, filed May 23, 1983) (denying government motion for summary judgment raising identical argument). Motion to Affirm, App. 12a.[32]

The fact that the AFDC and Food Stamp programs will not be harmed if religious objectors are exempted from the SSN requirement significantly distinguishes this case from *United States v. Lee*, 455 U.S. 252 (1982).[33] In *Lee*, this Court upheld

---

[32] The only case upholding the SSN requirement in the face of a religious objection is the 2-1 decision of the California Court of Appeals in *Mullaney v. Woods*, 97 Cal. App.3d 710, 159 Cal. Rptr. 902 (1979). That decision is inapposite, since the federal government was not a party to the case and the court held that no less restrictive alternatives existed solely because the state had no choice but to require the SSN under federal regulations. *Mullaney*, 97 Cal. App.3d at 727, 159 Cal. Rptr. at 911-12. There was no evidence in *Mullaney* of any independent harm to the government's interests which would be caused by exempting persons from the SSN requirement.

[33] *Lee* is also distinguishable because the government's interests were more significant than those underlying the SSN requirement. "[T]he broad public interest in maintaining a sound tax system is of such a high order," 455 U.S. at 260, that religious objections to payment of taxes traditionally and categorically have not been recognized. *Id.* at 259, n.10. Justice Stevens expressly stated that the Court's holding was limited to claims for tax exemptions. *Id.* at 263, n.3 (Stevens, J., concurring). He did acknowledge that exemptions should be more readily granted for "laws intended to provide a benefit to a limited class of otherwise disadvantaged persons." *Id.*

the government's refusal to exempt an Amish employer from the obligation to pay social security taxes for his employees. The *Lee* Court found that the social security system could not be maintained if employers could be exempted from payment of social security taxes. Indeed, Congress had expressly stated that voluntary coverage would undermine the program. Nonetheless it had attempted to accommodate religious beliefs to the extent feasible by exempting self-employed members of religious groups. The district court therefore properly distinguished the instant case from *Lee*. J.S. 17a.

In conclusion, the district court's findings that all the interests served by the SSN requirement may be satisfied without requiring that appellees, and other religious objectors, provide a SSN as a condition of receiving welfare benefits are clearly supported by the record.

C. The Government's Proposed "Programmatic Interest" Analysis Is Inconsistent With The Precedents Of This Court.

Perhaps recognizing that the district court's finding that there will be absolutely no harm to the administration of the AFDC and Food Stamp programs if religious objections to the SSN are honored cannot be overturned, the government invents a "programmatic interest" analysis which not only flies in the face of this Court's precedents, but also violates constitutional principles. The government maintains that the district court erred by limiting its analysis to the actual effect on the government's interests if Little Bird of the Snow and other likely religious objectors are exempted from the SSN requirement. It submits that the district court was required to hypothesize as to the impact of dispensing with the SSN requirement not only for the handful of religious objectors, but also for all AFDC and Food Stamp participants—including those who remain willing to provide their SSN as a condition of receiving welfare benefits. App. Br. 29-30.

In short, the government asserts that it has a compelling interest in the uniform enforcement of the SSN requirement

which must prevail unless an alternative, "applicable to the populace as a whole," would serve the same purposes. App. Br. 29. This is nothing less than an effort to sacrifice the religious beliefs of a few individuals to the bureaucratic craving for uniformity. As the district court recognized in rejecting this argument, the government's position "would effectively guarantee victory for the government in every case" because "the government has a strong interest in uniform enforcement of all laws and regulations." J.S. 17a.

The government may not so readily trammel fundamental first amendment freedoms. This Court has admonished that interference with free exercise of religion, like other enumerated rights, will be tolerated only when government interests of vital importance are in fact endangered by grave abuses. *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963). Consequently, in determining whether the government may enforce a statutory requirement which burdens an individual's sincerely held religious beliefs, the Court has attempted to determine the *actual effect* on the government's interest if religious objectors are accommodated. Of course, in determining the actual effect of granting exemptions, this Court has not solely analyzed the effect of exempting the individual plaintiff. But neither has it gone to the opposite extreme of theorizing the purported effect of exempting *all* persons, whether or not they harbor or are likely to advance religious objections to the statutory requirement, the analysis advocated by the government. What this Court has done is assess the effect of exempting the plaintiff and those other persons likely to register a religious objection. Hence, this Court has consistently held that an individual will be exempted from an otherwise uniform statutory requirement unless accommodating likely religious objectors will in fact threaten the integrity of the program at issue, or infringe rights of third persons.

Thus, in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), in determining whether the state's interest in universal education

would justify interference with religious beliefs, the Court focused solely upon the effect of exempting the Amish from a compulsory education law applicable to all persons under the age of 16. "[I]t was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected *by granting an exemption to the Amish*." *Id.* at 236 (emphasis supplied). While the Court believed that the Amish informal vocational education program fulfilled the interests served in compelling school attendance to age 16, it did not find it necessary to determine that such an alternative was available for the populace as a whole. Indeed, the Court pointed out that few other religious sects could provide alternatives equivalent to formal education mandated by the Wisconsin statute. 406 U.S. at 235-36. Nonetheless, the Court exempted the Amish.

Tacitly admitting that *Yoder* refutes its proposed programmatic interests analysis, the government urges that *Yoder* is *sui generis*. App. Br. 41.[34] On the contrary, *Yoder* is consistent with decisions of this Court granting and denying free exercise challenges to statutory requirements.

In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the Court scrutinized only whether exempting Sherbert, and other persons with similar beliefs, would in fact undermine the state's interests.[35] As the record indicated that only one Seventh Day

---

[34] The government submits that *Yoder* is *sui generis* because the Amish parents and the State shared a common interest in providing for the welfare of children. This is a rather puzzling basis for distinction, since the government and appellees share a common interest in the welfare of needy children. *See* pp. 9-14, *supra*.

[35] The Court did not inquire whether the state's interests could be satisfied by an alternative statute which could be applied uniformly and without exceptions. On the contrary, the Court suggested that Sherbert's beliefs could be accommodated by a statute which generally denied benefits to persons who refused available work but exempted persons who declined because of a religious prohibition against Saturday work. *Id.* at 407, n.7.

Adventist other than Sherbert had been unable to find a job which did not require working on Saturday (*id.* at 399, n.2), the Court held that the State had failed to prove that its welfare fund would be threatened.

Similarly, in *Thomas* v. *Review Board*, 450 U.S. 707 (1981), the Court declined to accept the notion that a single exemption should not be granted because of the surmised drain on welfare funds if all persons who voluntarily quit their jobs could collect unemployment. Rather the Court assessed the actual impact of exempting likely religious objectors from the statutory requirement. Because there was "no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create 'widespread unemployment,' or even to seriously affect unemployment" (*id.* at 719), this Court held that denial of benefits violated Thomas' right to the free exercise of his religious beliefs.[36]

Just as the precedents upholding free exercise claims have never adopted the government's programmatic interest analysis, the Court's decisions refusing to exempt religious objectors from statutory requirements have not rested upon the imagined consequences if all persons were exempted. *See, e.g.*, *Prince* v. *Massachusetts*, 321 U.S. 158, 169-70 (1944) (not analyzing consequences of exempting all persons from the law, or inquiring whether an alternative regulation uniformly

---

[36] The government attempts to distinguish *Sherbert* and *Thomas* on the ground that the statutes in issue permitted exemptions for "good cause." App. Br. 38. In neither case did the Court rely upon this fact in its analysis; since the Court was considering state statutes authoritatively construed by state courts to preclude religious exemptions, the Court could not have done so.

The government's observation that the Court in *Sherbert* and *Thomas* found no compelling governmental interest similarly is a distinction without a difference, as the states' interests in *Sherbert* and *Thomas* are the same as—if not stronger than—the government's interests in the SSN requirement. *See* pp. 20-23, *supra*.

applicable to the populace as a whole could fulfill the state's interests, but concluding that exempting appellant would defeat the express purpose of the legislation by permitting her children to engage in the conduct which the state had deemed destructive of the welfare of children);[37] *Braunfeld* v. *Brown*, 366 U.S. 599, 608 (1961) (scrutinizing the actual effect of granting the proposed exception for likely religious objectors, and concluding that the purpose of the statute would be thwarted if the religious objection were honored).[38]

Similarly in *United States* v. *Lee*, 455 U.S. 252 (1982) the Court did not depart from the reasoning which it used in deciding other free exercise claims. The *Lee* Court did not weigh the impact on the social security system if all persons—likely religious objectors and non-objectors alike—were exempted from paying taxes. Nor did it examine whether the religious beliefs of the Amish could be accommodated by an alternate *uniform* regulation which would not undermine the social security system. Rather, the Court followed its well established approach and assessed how exempting persons likely to advance religious claims was bound to affect the social

---

[37] Although the government contends that an individualized exemption in *Prince* would not have interfered with the legislative purpose because the child was supervised by her aunt (App. Br. 34), the Court expressly found that adult supervision would not eliminate the adverse effects of the prohibited conduct. *Prince*, 321 U.S. at 169-70.

[38] Contrary to the government's assertion that permitting the Jewish merchants to sell their wares would not have interfered with the goals of the Sunday closing law (App. Br. 33), the Court expressly found that: "[R]eason and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity." *Braunfeld*, 366 U.S. at 608. The *Sherbert* Court distinguished *Braunfeld* on the ground that exempting the Jewish merchants "would have rendered the entire statutory scheme unworkable." *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963).

security system, as well as third persons. Because the *Lee* Court anticipated "myriad exceptions flowing from a wide variety of religious beliefs" (455 U.S. at 260), and further found that the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief" (id. at 260), the case was distinguishable from *Sherbert* and *Thomas*.[39] In addition to disabling the government program, the Court concluded that exempting employers from paying social security taxes "operates to impose the employer's religious faith on the employees." *Id.* at 261.

Thus the *Lee* Court denied the Amish employer's claim for an exemption because to do so would result in significant detriment to the social security system, as well as to third persons. It did not adopt the programmatic interest analysis invented here by the government.[40]

---

[39] In his concurring opinion in *Lee*, Justice Stevens advocated a new standard for free exercise cases. Rather than requiring the government to bear the "heavy burden of justifying the application of neutral general laws to conscientious objectors," Justice Stevens would shift the burden to the religious objector, requiring that he demonstrate "that there is a unique reason for allowing him a special exemption." *Lee*, 455 U.S. at 262 (Stevens, J., concurring). In view of this Court's decisions in *Sherbert* and *Thomas*, however, Justice Stevens did not propose to apply this standard to laws, like the AFDC and Food Stamp programs involved in the instant case, which are "intended to provide a benefit to a limited class of otherwise disadvantaged persons." *Id.* at 263, n.3.

[40] The speech cases relied on by the government (App. Br. 36-37) are wholly inapposite. The greater protection afforded religious belief, as opposed to speech, when facially neutral statutes infringe those interests is mandated by the very different consequences such infringements pose. As the Court noted in *Sherbert* and *Yoder*, where religious accommodation is not afforded, individuals are forced to violate deeply held claims of conscience. By contrast, when a facially neutral law comes into conflict with speech interests, the speech can generally be exercised in an alternative manner. *See, e.g., Clark* v.

This Court has never been willing to sacrifice first amendment freedoms because of imagined threats to governmental interests. Where, as here, exempting religious objectors from a statutory requirement will neither adversely affect the government's interests, nor impinge on the rights of others, this Court has invariably granted the exemption to preserve the free exercise of religion.

D. The Government's Proposed "Programmatic Interest" Analysis Violates The Fundamental Principle That The Majority May Not, By Legislation, Invade Constitutional Rights Of The Minority.

The government urges that examining the actual impact of religious exemptions "defies common sense" because widespread religious sects will be less likely to prevail in free exercise cases than minority faiths. App. Br. 35. What the government views as anomalous, however, is entirely consistent with the intent of the drafters of the Bill of Rights. For it was the purpose of the first amendment to guarantee the right of every individual to choose his own creed, as well as reject the religious views of the majority. *Wallace* v. *Jaffree*, 105 S. Ct. 2479, 2488-89 (1985).

While mainstream religious faiths are able to preserve religious freedom through the political process, minority religious groups may be incapable of having their beliefs known, much less protected, by the legislature. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938). Indeed, the historic infringement of the rights of Native Amer-

---

Community for Creative Non-Violence, 104 S. Ct. 3065, 3069 (1984); *Heffron* v. *Int'l Society for Krishna Consciousness*, 452 U.S. 640, 648 (1981). Moreover, even in considering requested accommodations from neutral regulations in speech cases, the Court has not followed the course proposed by the government here and examined the consequences if all persons whatsoever (as opposed to all likely to claim an exemption) were accommodated. *See, e.g.*, *Wooley* v. *Maynard*, 430 U.S. 705 (1977).

icans is a grim reminder of the impotence of minority groups to secure basic rights through legislative means. *See* pp. 14-15, *supra*. The present case is but another example of this phenomenon, as there is no evidence that Congress, in enacting the SSN requirement, was aware of those few persons whose sincerely held religious beliefs prevent them from supplying a SSN. *See* 15-18, *supra*. Hence, it is the first amendment, and the courts, to which these religious minorities must turn to ensure their fundamental right to freely exercise their religious beliefs. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943).

What is most pernicious about the government's programmatic interest analysis is that it is fundamentally at odds with the basic premise of the Bill of Rights. Under the proffered standard, minority religious beliefs are forfeited, not because they interfere with the legislative purpose, but simply because accommodating these beliefs would depart from the uniform standard dictated by the majority. This Court has flatly rejected the proposition that the majority's interest in the uniform application of its laws overrides any claim to exemption because of religious scruples. *Gillette* v. *United States*, 401 U.S. 437, 456-60 (1971).[41] This is especially true with respect to

---

[41] While refusing to sanction any "categorical, global 'interest' in stifling individualistic claims to noncompliance", the *Gillette* Court recognized that religious exemptions may be denied where the government's compelling interests would, in fact, be endangered. *Gillette*, 401 U.S. at 460. It held that Congress was justified in refusing to exempt conscientious objectors to a particular war, finding that such exemptions could undermine the ability to raise an effective military. Given the risks at stake, the likelihood of pseudo-religious claims for draft exemptions, like the likelihood of contested claims in tax cases, was particularly great.

By contrast, the government here offers only the unsupported and fanciful assertion that exempting a handful of religious objectors from the SSN requirement "cannot help but undermine public confidence in the integrity of these welfare programs." App. Br. 31.

the right of parents to direct the religious upbringing of their children:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce v. *Society of Sisters*, 268 U.S. 510, 535 (1925); *see also Meyer* v. *Nebraska*, 262 U.S. 390, 401-02 (1923).

Because "[a] distinctive feature of America's tradition has been respect for diversity", *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 745 (1982) (Powell, J., dissenting), this Court has condemned governmental efforts to compel uniformity:

> Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

West Virginia State Board of Education v. *Barnette*, 319 U.S. 624, 636-37 (1943).[42]

---

[42] The eminent historian Alexis de Tocqueville posited that the greatest threat to individual freedom in democratic society is what he termed "administrative despotism," whereby the government

> covers the whole of social life with a network of petty, complicated rules that are both minute and uniform, through which even men of the greatest originality and the most vigorous temperament cannot force their heads above the crowd.

A. Tocqueville, *Democracy in America*, p. 667 (J. Mayer & M. Lerner 1966 ed.); *see also People* v. *Woody*, 394 P.2d 813, 821, 40 Cal. Rptr. 69 (1964) ("In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important.")

The record amply demonstrates that exempting Little Bird of the Snow and other religious objectors from the SSN requirement will not affect, much less undermine, the AFDC and Food Stamp programs. All the government bemoans is having to depart from its uniform procedure to accommodate appellees' religious beliefs. The government's lament cannot justify infringement of appellees' religious beliefs. As this Court stated in *I.N.S.* v. *Chadha*, 462 U.S. 919, 959 (1983):

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or the President. [Citation omitted.] With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

The government's programmatic interest analysis must be spurned by this Court, for it is a wholesale departure from the fundamental tenets of our Bill of Rights.

IV. THE DISTRICT COURT'S INJUNCTION IS NOT OVERBROAD.

The government urges that even if the first amendment precludes denying welfare benefits to appellees, because of their refusal to provide a SSN for Little Bird of the Snow, the district court cannot enjoin the government from using or disseminating the SSN issued in her name at birth (*see*, *supra*, pp. 6-7, J.S. 24a-25a. While the government concedes that use of the SSN would violate appellees' religious beliefs, it nonetheless posits that appellees have no standing to challenge this use

because they are merely "witnessing actions *of* government." App. Br. 45.

The government never raised this objection before the trial court. It is settled that this Court will not ordinarily consider issues which are not presented to the lower courts. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 148, n.2 (1970). This is particularly critical in the present case, for had the government made this argument, the court obviously would have issued a markedly different order—expungement—to guarantee that the government could not subvert appellees' religion in the manner it now proposes.

The government concedes that the welfare statutes require the *applicant* to provide a SSN. It argues, however, for a construction which permits the government to use a SSN in its possession even if the applicant, for religious reasons, refuses to provide it. Fearing that the government would attempt to irreversibly damage their ability to prepare Little Bird *of* the Snow for greater spiritual power by just such a subterfuge, appellees requested that the district court order the government to expunge Little Bird *of* the Snow's SSN from its files. J.A. 490. Because the government never contended that it could not be enjoined from using a number in its possession (*see* J.A. 512-13), the trial court held that eliminating Little Bird *of* the Snow's SSN was not necessary to protect appellees' religious beliefs. J.A. 22a. It merely enjoined the government from using or disseminating that number. *Id.* Had the government asserted a right to use a number already in its possession, it is manifest that the court would have directed the government to expunge Little Bird *of* the Snow's SSN. J.A. 21a-22a.

Even were this Court to entertain the government's argument, it is apparent that appellees are not merely witnesses to the government's unilateral decision to utilize a SSN for Little Bird *of* the Snow. The government will have cause to use Little Bird *of* the Snow's SSN prior to the time she reaches age 16 if, and only if, appellees opt to apply for public benefits on her behalf. Indeed, the Social Security Administration had assured

Mr. Roy that the number would remain dormant unless appellees used it. J.A. 466-67. Thus the government's threat to use Little Bird of the Snow's SSN imposes the same burden on appellees' religion as enforcement of the SSN requirement. In either case, appellees are forced to choose between abandoning their religious beliefs and foregoing life-sustaining welfare benefits.[43] This Court has steadfastly held that confronting individuals with such a choice penalizes the free exercise of religion. *Thomas*, 450 U.S. 707, 716-18; *Sherbert*, 374 U.S. 398, 406.

This Court must not sanction the government's effort to emasculate appellees' rights by belatedly attacking the district court's remedy.

---

[43] The government asserts that it has the right to assign a SSN to persons who are required by federal law to have one but decline to complete an application. App. Br. 46, n.19. It bases this claim on advice purportedly received from the Social Security Administration, but which was never offered into evidence at trial.

The government does not contend that it may, or does, unilaterally assign SSNs to all citizens. Under the welfare statutes in issue, a SSN is required only if an individual applies for benefits. As with the government's use of Little Bird of the Snow's SSN, the assignment of a SSN would be triggered only if appellees apply for benefits.

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted,

GARY S. GILDIN
(Counsel of Record)
150 South College Street
Carlisle, PA 17013
(717) 243-4611

FRANKLIN A. MILES, JR.
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108
(717) 232-8000

STEFAN PRESSER
American Civil Liberties Union Foundation of Pennsylvania
Independence Mall
21 South 5th Street
Philadelphia, PA 19106

Of Counsel:
CHARLES S. SIMS
American Civil Liberties Union
132 West 43rd Street
New York, NY 10036

APPENDIX

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth at page 1 of this brief, this case also involves the following statutory provisions:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

42 U.S.C. § 601.

> It is declared to be the policy of Congress, in order to promote the general welfare, to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households. Congress finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of the Nation's agricultural abundance and will strengthen the Nation's agricultural economy, as well as result in more orderly marketing and distribution of foods. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to obtain a more nutritious diet through normal channels of

trade by increasing food purchasing power for all eligible households who apply for participation.

7 U.S.C. § 2011.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

In the certification of applicant households for the food stamp program, there shall be no discrimination by reason of race, sex, religious creed, national origin, or political beliefs.

7 U.S.C. § 2020(e).

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

42 U.S.C. § 1996.

Supreme Court, U.S.
FILED
JAN 9 1989
JOSEPH F. SPANIOL, JR.

No. 84-780

In the Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

STEPHEN J. ROY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE APPELLANTS

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases: Page

Alcaraz v. *Block*, 746 F.2d 593 11
Alexander v. *Choate*, No. 83-727 (Jan. 9, 1985) 5
Aptheker v. *Sec'y of State*, 378 U.S. 500 2
Bornstager v. *Stevens*, 772 F.2d 419, *cert. denied*, No. 85-719 (Dec. 2, 1985) 15, 16
Callahan v. *Woods*, 736 F.2d 1269 ..... 5, 11
Carrington v. *Rash*, 380 U.S. 89 14
Cleveland Bd. of Educ. v. *LaFleur*, 414 U.S. 632 14
Firemen v. *Chicago, R.I. & P.R.R.*, 393 U.S. 129 9
Frontiero v. *Richardson*, 411 U.S. 677 14
Goldberg v. *Kelly*, 397 U.S. 254 14
Graham v. *Richardson*, 403 U.S. 365 13
Green v. *Philbrook*, 576 F.2d 440 3
Heckler v. *Mathews*, No. 82-1050 (Mar. 5, 1984) 2
McElrath v. *California*, 615 F.2d 434 ..... 3, 11
Memorial Hospital v. *Maricopa County*, 415 U.S. 250 13
Mullaney v. *Woods*, 97 Cal. App. 3d 710, 158 Cal. Rptr. 902 ..... 5, 11
NLRB v. *Catholic Bishop*, 440 U.S. 490 2
Schneider v. *State*, 308 U.S. 147 13
Schweiker v. *Hansen*, 450 U.S. 785 3
Shapiro v. *Thompson*, 394 U.S. 618 ..... 12, 13, 15
Sherbert v. *Verner*, 374 U.S. 398 ..... 11, 15
Speiser v. *Randall*, 357 U.S. 513 14
Stanley v. *Illinois*, 405 U.S. 645 14
Stevens v. *Berger*, 428 F. Supp. 896 ..... 5, 11
Swain v. *Pressley*, 430 U.S. 372 2
Thomas v. *Review Bd.*, 450 U.S. 707 ..... 11, 14, 15
Torcaso v. *Watkins*, 367 F.2d 488 13
Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63 6
TVA v. *Hill*, 437 U.S. 153 2
United States v. *Butcheider*, 442 U.S. 114 2
United States v. *Clark*, 445 U.S. 23 2
United States v. *Jackson*, 390 U.S. 570 12
United States v. *Lee*, 455 U.S. 252 ..... 8, 10
United States v. *Sullivan*, 332 U.S. 689 2
Vance v. *Bradley*, 440 U.S. 93 9

Cases—Continued: Page

Village of Schaumberg v. *Citizens for a Better Environment*, 444 U.S. 620 13

Wilson v. *Block*, 708 F.2d 735, cert. denied, 464 U.S. 956 6

Constitution and statutes:

U.S. Const. Amend. I (Free Exercise Clause) 6, 7, 17

American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 *et seq.*:
- § 1, 42 U.S.C. 1996 6
- § 2, 92 Stat. 470 6

Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*:
- Tit. VI, 42 U.S.C. 2000d *et seq.* 4
- Tit. VII, 42 U.S.C. 2000e *et seq.*:
  - 42 U.S.C. 2000e-2 5
  - 42 U.S.C. 2000e(j) 6

Food Stamp Act of 1977, 7 U.S.C. 2011 *et seq.*:
- 7 U.S.C. 2020(c) 5
- 7 U.S.C. 2025(a) 2

Social Security Act, Tit. IV, 42 U.S.C. 601 *et seq.*:
- 42 U.S.C. 602(a)(25) 2
- 42 U.S.C. 602(a)(26)(B) 3, 4
- 42 U.S.C. 606(b)(2) 4

Miscellaneous:

120 Cong. Rec. 41808, 41809 (1974) 4

124 Cong. Rec. 21444-21445 (1978) 6

127 Cong. Rec. (1981):
- pp. 24779-24788 4
- p. 24783 7
- pp. 24848-24853 4

H.R. Rep. 95-1308, 95th Cong., 2d Sess. (1978) 6

S. Rep. 95-709, 95th Cong., 2d Sess. (1978) 6

Staff of Senate Comm. on Agriculture, Nutrition, and Forestry, 99th Cong., 1st Sess., *The Food Stamp Program: History, Description, Issues, and Options* (Comm. Print 1985) 4

U.S. Dep't of the Interior, *American Indian Religious Freedom Act Report* (1979) 6

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-780

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

STEPHEN J. ROY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE APPELLANTS

The district court has granted appellees an exemption from the *only* identification requirement that Congress has expressly imposed on applicants for and recipients of benefits under the AFDC and Food Stamp programs, based on its determination that appellees' religious objection to providing a social security number for their daughter outweighs the government's interest in administering these two massive social welfare programs in a manner that most clearly enables the government to verify statutory eligibility and to detect fraud and mismanagement. Appellees' attempts to portray this substantial intrusion on the prerogatives of Congress as insignificant are unavailing.

1. a. Appellees first argue (Br. 9-18) that this case can be decided on statutory grounds, contending that the express requirement contained in the AFDC and Food Stamp statutes for the provision of an SSN for each member of a household receiving benefits should be construed so as to permit religious exemp-

tions in order to effectuate the intent of Congress to provide benefits to the needy. Appellees' argument does violence to the most elementary principle of statutory construction.[1]

The language of the two statutes in question could not be more clear. Section 402(a)(25) of the Social Security Act, 42 U.S.C. 602(a)(25) (emphasis added), provides that a state AFDC plan "*must* • • • provide (A) that, *as a condition of eligibility* under the plan, *each* applicant for or recipient of aid *shall* furnish to the State agency his social security account number • • • and (B) that each State agency *shall utilize* such account numbers • • • in the administration of such plan." Section 16(e) of the Food Stamp Act of 1977, 7 U.S.C. 2025(e) (emphasis added), provides that the "Secretary [of Agriculture] and State agencies *shall* (1) *require, as a condition of eligibility for participation in the food stamp program,* that *each* household member furnish to the State agency their social security account number • • • and (2) *use* such account numbers in the administration of the food stamp program." Here, as in *TVA* v. *Hill*, 437 U.S. 153, 173 (1978), "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer • • •." And, just as in *TVA* v. *Hill*, "[t]his language admits of no exception" (*ibid.*).

Notwithstanding the unambiguous language of the statutory provisions at issue, appellees urge the Court to reject a "literal construction" (Br. 10) in order to advance what appellees perceive as Congress's single-minded intent to provide benefits

---

[1] Appellees rely on the "maxim • • • of statutory construction" that "statutes should be construed to avoid constitutional questions" (*United States* v. *Rutzhelder*, 442 U.S. 114, 122 (1979)). But such a construction is to be rendered " 'only when [it] is "fairly possible" from the language of the statute' " (*id.* at 122, quoting *Swain* v. *Pressley*, 430 U.S. 372, 378 n.11 (1977)). The rule does not "authoriz[e] a court in interpreting a statute to depart from its clear meaning" (*United States* v. *Sullivan*, 332 U.S. 689, 693 (1948)) or to " 'pervert[] the purpose of a statute • • •' or judicially rewrit[e] it" (*Aptheker* v. *Sec'y of State*, 378 U.S. 500, 515 (1964) (citation omitted)). See *Heckler* v. *Mathews*, No. 82-1050 (Mar. 5, 1984), slip op. 12. Appellees' reliance (Br. 15-16) on *United States* v. *Clark*, 445 U.S. 23 (1980), and *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), is therefore misplaced, because the statutes at issue in those cases were fairly susceptible to interpretations that avoided the need for constitutional adjudication. Such is not the case here.

needy individuals. Appellees urge the Court to elevate the words of grant in the two statutes, which evince Congress's intent to provide benefits to the needy, over the express words of limitation, which set conditions on the receipt of such benefits. But the Court is not free to pick and choose from among different parts of the statute, enforcing certain provisions and ignoring others. See, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. 785, 790 (1981). While it is true that Congress wanted to provide benefits to low-income persons, Congress also insisted on scrupulous adherence to the SSN requirement in order to determine and verify whether applicants for benefits are in fact needy. See *McElrath* v. *Califano*, 615 F.2d 434, 440 (7th Cir. 1980); *Green* v. *Philbrook*, 576 F.2d 440, 445 & n.3 (2d Cir. 1978).

b. Appellees' attempt to circumvent the plain language of the statutes involved is not aided by any legislative history. On the contrary, as we explained in our opening brief (at 15-16, 39), the available legislative history shows that Congress affirmatively decided to impose the SSN requirement in order to promote the governmental interests of detecting and preventing fraud, verifying eligibility, and efficiently managing enormous social welfare programs. Appellees nevertheless quote (Br. 11-12) excerpts from the legislative history of a different provision of the AFDC statute (Section 402(a)(26)(B) of the Social Security Act, 42 U.S.C. 602(a)(26)(B)), which requires applicants for and recipients of AFDC benefits to cooperate with the states in obtaining support payments owed by absentee parents for their dependent children. Appellees stress (Br. 12) that Congress did not intend to penalize dependent children with the loss of benefits simply because a mother might fail to assist the state in locating a missing father. Appellees' argument is totally beside the point and, if anything, cuts against their position here. First, the statutory provision on which they rely, unlike the SSN requirement, contains an express exemption from the duty to cooperate, applicable if the benefit applicant or recipient "is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed." Cf. Gov't Br. 38 & n.16. Thus, the decision to

cooperate with the government is not, as appellees would have it, left to the applicant or recipient. Moreover, if the applicant or recipient is found ineligible for benefits on account of his or her unexcused failure to cooperate, benefits for the child are paid not to the parent-applicant but to a representative payee (42 U.S.C. 602(a)(26)(B), 606(b)(2)).

Equally important, the "cooperation" requirement was imposed as a cost-saving measure. Congress was fully aware that it was spending vast amounts of unnecessary money on the AFDC program simply because absentee parents refused to comply with court-ordered support obligations. See 120 Cong. Rec. 41808 (1974) (remarks of Rep. Ullman); *id.* at 41809 (remarks of Rep. Ullman). The "cooperation" requirement, like the SSN requirement, was enacted to ensure that scarce government resources are allocated to those most truly in need and not unnecessarily diverted to persons having other sources of support. Both requirements serve similar functions; for purposes of this case, however, what is significant is that Congress chose *not* to permit any exceptions from the SSN requirement.[3]

c. Nor is there any merit to appellees' argument (Br. 14-15) that denial of welfare benefits to Little Bird of the Snow would constitute prohibited discrimination based on national origin or religion. Appellees first rely on Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, which prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. Quite simply, this statute says nothing at all about religious discrimination. And to the extent appellees claim that application of the SSN requirement to them constitutes discrimination based on national origin, *i.e.*, Roy's Native American heritage, they are clearly wrong. First, it is now firmly established that

---

[3] Appellees essentially admit (Br. 13) that there is no pertinent legislative history to support their position insofar as it pertains to the SSN requirement contained in the Food Stamp Act. What legislative history there is merely confirms Congress's overriding concern with fraud and abuse, a concern that was acted upon by making the SSN requirement in the Food Stamp Act mandatory. See generally 127 Cong. Rec. 24779-24788, 24848-24853 (1981); Staff of Senate Comm. on Agriculture, Nutrition, and Forestry, 99th Cong., 1st Sess., *The Food Stamp Program: History, Description, Issues, and Options* 213 (Comm. Print. 1985); see also pages 7-8, *infra*.

Title VI reaches only intentional discrimination; it does not, of its own force, encompass claims of disparate impact. See *Alexander* v. *Choate*, No. 83-727 (Jan. 9, 1985), slip op. 5. By no stretch of the imagination could the facially-neutral SSN requirement constitute intentional discrimination. In addition, it is doubtful that Roy's religious objection to the SSN requirement can be meaningfully associated with his national origin.[3] There is no testimony in the record that opposition to SSNs is a belief shared by any other Native American. Indeed, at least four other challenges to the SSN requirement have been brought by persons whose religious beliefs are wholly unrelated to their national origin.[4] These cases clearly demonstrate that a claim of discrimination based on religious creed is not transformed into a claim of discrimination based on national origin, within the purview of Title VI, simply because the person who possesses the religious belief at issue is of a particular national origin.

Appellees' case also is not advanced by the nondiscrimination provision contained in the Food Stamp Act, 7 U.S.C. 2020(c). Appellees offer no evidence to suggest that this statute has any meaning other than what is apparent from its face—food stamp benefits are to be distributed evenhandedly, without adverse discrimination *or* favoritism. Coverage of "disparate impact" discrimination is no more appropriately read into Section 2020(c) than it is into Title VI.

That this is the correct interpretation of the statute is supported by a comparison of Section 2020(c) with Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* As originally enacted, that Act simply barred religious discrimination in employment (42 U.S.C. 2000e-2). In 1972, the Act was amended

---

[3] Roy testified that he derives his religious beliefs in part from association with other Native Americans descended from the Abenaki Tribe, in part from his own readings about religious teachings, and in part from "intuition" (J.A. 72). Roy did not testify that any of the sources for his religious beliefs (except, presumably, his "intuition") condemned the use of SSNs as being a violation of Abenaki or other Native American beliefs.

[4] See *Callahan* v. *Woods*, 736 F.2d 1269 (9th Cir. 1984); *Stevens* v. *Berger*, 428 F. Supp. 896 (E.D.N.Y. 1977); *Mullaney* v. *Woods*, 97 Cal. App. 3d 710, 158 Cal. Rptr. 902 (1979); *Atwood* v. *Idaho Dep't of Health & Welfare*, No. 83-3066 (D. Idaho filed May 23, 1983).

to require "reasonabl[e] accommodat[ions]" to employees' religious observances or practices if such accommodations could be made without "undue hardship on the conduct of the employer's business" (42 U.S.C. 2000e(j)). See *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 66 (1977). The Food Stamp Act, on the other hand, contains no "reasonable accommodation" provision. Thus, "accommodation" of appellees' religious beliefs, if any, must come from the Free Exercise Clause itself, and not from the Food Stamp Act.

The third statute on which appellees rely (Br. 14-15), the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. 1996, is equally irrelevant. AIRFA was intended only to ensure that Native Americans receive the same protection under the First Amendment to which all Americans are entitled; it was not intended to grant Native Americans any greater rights. See *Wilson* v. *Block*, 708 F.2d 735, 746-747 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983); 124 Cong. Rec. 21444-21445 (1978) (remarks of Rep. Udall); U.S. Dep't of the Interior, *American Indian Religious Freedom Act Report* 18 (1979) [hereinafter cited as *AIRFA Report*]. Moreover, Congress enacted AIRFA primarily to address three specific concerns, none of which is implicated here.[5]

---

[5] Those concerns were (1) the denial of access to Native American religious sites, (2) restrictions on the p[illegible]vision of substances such as peyote, and (3) actual interference with Native [illegible]erican religious events. See S. Rep. 95-709, 95th Cong., 2d Sess. 2-4 (1978); H.R. Rep. 95-1308, 95th Cong., 2d Sess. 2-3 (1978).

Uncodified Section 2 of AIRFA, Pub. L. No. 95-341, 92 Stat. 470, required the President to direct federal agencies to evaluate their policies and procedures "in consultation with native traditional religious leaders" and report their findings to Congress within 12 months. This requirement was fulfilled when the President released the *AIRFA Report* in August 1979. Nevertheless, amici curiae National Congress of American Indians, *et al.* contend (Br. 41-50) that the Departments of Agriculture and Health and Human Services did not comply with Section 2 of AIRFA, because there is no evidence in the *AIRFA Report* to demonstrate that Agriculture and HHS expressly considered the effects, if any, of the SSN requirement on Native American religious practices. As we have previously noted, however, one need not be a Native American to assert a religious objection to the SSN requirement (see page 5 & note 4, *supra*). Thus, there would have been no reason to give special consideration to that requirement in conjunction with a study of the

2. The thrust of appellees' constitutional argument is that the government must accommodate their religious objection to supplying an SSN for Little Bird of the Snow unless it can show that the AFDC and Food Stamp programs would collapse if even one person were exempted from the SSN requirement. If that is indeed the government's burden, then we would agree that appellees should prevail in this case. Quite obviously, the government can "accommodate" one or a handful of individuals such as Little Bird of the Snow, simply by removing them from the system utilized to ensure fair and accurate payments to all other program participants. In our submission, however, nothing in this Court's Free Exercise jurisprudence requires the government to furnish welfare benefits on the basis of whatever information an applicant deems appropriate to provide. Our position is not, as appellees would have it (Br. 33), an attempted resurrection of the right/privilege dichotomy. Instead, we submit only that the Free Exercise Clause does not embrace religious claims to exemptions from providing *the very information needed to determine eligibility for benefits.* Moreover, the very growth of government that makes possible the provision of assistance to the less fortunate members of our society is inextricably intertwined with the need for a uniform system of program administration such as that mandated by Congress when it enacted the SSN requirement.

Appellees should prevail in this case only if the Court is willing to accept the notion that "a little bit of fraud"—either actual or potential—is something that Congress and the American public are required to accept in the name of Free Exercise. But it is quite clear that neither Congress nor the taxpayers are willing to shoulder that risk. As Representative Richmond explained in connection with the bill that made the SSN requirement mandatory for the Food Stamp program (127 Cong. Rec. 24783 (1981) (emphasis added)):

---

impact of government programs on Native American religious practices. With only one known Native American professing a religious objection to the SSN requirement, it is quite fanciful to assume, as amici do (Br. 47-48), that further consultation with Indian religious leaders would have resulted in the discovery of Native American religious objections to the SSN requirement.

> We know that however generously motivated Americans may be to furnish resources to the poor to enable them to survive, * * * they understandably object if they believe that those resources are being abused or wasted. * * *.
>
> We want to be certain that the food stamp program is run as efficiently and as error-free as possible.
>
> *We want applicants and recipients alike constantly to be aware that the Congress does not and will not tolerate any refusal to disclose earnings accurately, and underreporting of welfare or other assistance program benefits, any efforts to evade the work requirement or any other attempts to take advantage of the program and dollars intended only for those who completely satisfy the stringent eligibility requirements set forth in sections 5 and 7 of the Food Stamp Act of 1977 and further tightened this year and in this bill.* [*]

In light of this statement of congressional intent, appellees are wrong in contending (Br. 36-37 & n.33) that this case is different from *United States* v. *Lee*, 455 U.S. 252 (1982). In *Lee*, the Court held that an Amish employer's objection to paying social security taxes was required to give way to the government's compelling interest in uniform administration of the tax system. In the instant case, appellees' objection to the SSN requirement must give way to the government's compelling interest in fair and evenhanded administration of public benefit programs—an interest that both is and is perceived to be undermined if the government must grant ad hoc exemptions to uniform standards of eligibility. The two cases are simply opposite sides of the same coin—*Lee* involved the credit side of the government ledger, while the instant case involves the debit side. In both situations, however, the possibility of "myriad exceptions flowing from a wide variety of religious beliefs" (455 U.S. at 260) is incompatible with Congress's crucial and compelling determination that there shall be no exceptions to the requirements it has enacted.

---

[*] It is of no consequence that the SSN requirement is not an infallible device for ferreting out fraud and abuse. (We respond to appellees' baseless contention that the SSN requirement is virtually useless at note 7, *infra*.) What is important is Congress's determination that the SSN requirement is the single most effective means for achieving the governmental interests at stake.

a. Notwithstanding the importance attached by Congress to the SSN requirement, appellees, relying on isolated fragments of trial testimony [7] and inapposite cases, argue (Br. 20-26) that the governmental interests at stake in this case are not compelling. In the district court, appellees did not seriously dispute the substantial governmental interest, as a general matter, in requiring SSNs in the administration of the AFDC and Food Stamp programs; instead, their contention was that the government had no compelling interest in requiring an SSN from Little Bird of the Snow. See J.A. 53. Now, however, appellees contend (Br. 20-26) that the SSN requirement does not serve a compelling governmental interest in any respect.

---

[7] As a preliminary matter, we question whether reliance on the trial record developed in this or any other single case constitutes a proper method of constitutional adjudication. In a wide variety of areas, this Court has recognized that a district court's "responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was 'pure speculation.'" *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979) (quoting *Firemen* v. *Chicago, R.I. & P.R.R.*, 393 U.S. 129, 138-139 (1968)).

In any event, appellees paint a highly misleading picture of the utility of SSNs by citing to portions of the trial transcript out of context. For example, in describing the "weighted values" given to various pieces of identifying information, appellees assert (Br. 31) that "no points are subtracted" if an applicant's SSN is missing from his file. Appellees neglect to point out that no points are subtracted for *any* category of missing information, including name, date of birth, race or sex. J.A. 308. Instead, points are *added* for positive matches and *subtracted only* for positive "mismatches." *Ibid.* Appellees' statement (Br. 31) that "[t]he greatest value is attributed to name, birthdate and country of residence" is equally misleading, because the values to which appellees refer are *cumulative*. In fact, *far less* value is attributed to the other factors, when considered in isolation, than is attributed to the SSN alone. The only exception was explained at trial, but the explanation is conspicuously absent from appellees' brief. Thus, the manual on which appellees rely (which, despite appellees' protestations (Br. 30 n.23), is out of date and not even used in Pennsylvania (J.A. 321)), suggests a "weighted match value" of 270 points for country of residence and a "weighted match value" of 220 points for the SSN. But the government witness who explained the manual testified that the 270-point value assigned to country of residence was not a fixed value, because, the larger the country, the more likely it would be that two or more people in that country would share the same name. J.A. 313-315. In other

Appellees' argument is totally without merit. At the outset, we note that, if the Court were to agree that the government lacks a compelling interest in verifying eligibility and preventing and detecting fraud, there would be no occasion to balance appellees' religious claim against the government's interests. See, *e.g.*, *United States* v. *Lee*, 455 U.S. at 257-258, 259. In that event, appellees or others asserting similar claims could legitimately refuse to comply not only with the SSN requirement but also with any other informational requirements deemed

---

words, the values in the manual are simply suggestions that may be adjusted up or down depending on particular circumstances. Appellees also fail to note the significant difference in the suggested values of a "mismatch" in county and SSN. A "mismatch" in county of residence calls for a subtraction of only 6 points, whereas a "mismatch" in SSN calls for a subtraction of 110 points.

In addition, appellees place entirely too much weight (Br. 29-30 n.24) on the uniqueness of Little Bird of the Snow's name. In the first place, she or her parents are perfectly free to change it at any time. Second, the very uniqueness of her name is itself a problem for the computer matching processes utilized by state welfare agencies. Because human beings make data entries into computers, the capacity to search for Little Bird of the Snow's records by name alone depends in large part on an individual computer operator's subjective assessment of what constitutes Little Bird of the Snow's first name and what constitutes her middle name. See J.A. 397-398. Unlike the nine-digit social security number, there is no standardized method for entering Little Bird of the Snow's name into any computer system.

Finally, appellees note (Br. 5-6 n.7) that information about Little Bird of the Snow -- to be precise, the existence of the SSN she has held since shortly after her birth but which was not revealed to the district court until the last day of trial -- was determined by entering her name and birthdate into a Social Security Administration computer. From this fact, appellees appear to argue (*ibid.*) that the possibility of conducting searches by name and birthdate obviates the need for SSNs. Appellees again neglect to mention a crucial fact, which is that the only information that can be discovered by the type of search conducted in this case is whether or not a person has an SSN. J.A. 387, 448-449. The computer file used for this purpose, known as the Alphabetical Identification Data Base (Alphident), obviously is necessary to process applications for SSNs and obviously must rely principally on a person's name and birthdate. But it serves none of the functions necessary in the administration of the AFDC and Food Stamp programs, such as verification of income and resources, because that type of information is maintained in other computer systems that are more commonly accessed by SSNs. In any event, appellees do not seriously dispute (see Br. 29 n.23) that automatic computer matches are virtually impossible without SSNs.

necessary to determine eligibility for benefits. Religious objections to the use of names, birthdates, addresses, or any other identifying information all would have to be honored, because, by hypothesis, there would be no countervailing governmental interest of sufficient magnitude to override whatever religious claims might be advanced. The absurdity of this proposition is self-evident, but it would be the inevitable result of acceptance of appellees' argument that the governmental interests in this case are not compelling.

It is not surprising, therefore, that every court that has considered the issue, including the court below, has concluded that the government does indeed have a compelling systemic interest in the SSN requirement. See J.S. App. 15a, 18a, 32a; *Alcaraz* v. *Block*, 746 F.2d 593, 606 (9th Cir. 1984); *Callahan* v. *Woods*, 736 F.2d 1269, 1274 (9th Cir. 1984); *Mullaney* v. *Woods*, 97 Cal. App. 3d 710, 158 Cal. Rptr. 902 (1979); *cf. McElrath* v. *Califano*, 615 F.2d at 439-440 (SSN requirement both rationally related and *essential* to effective administration of AFDC program).[9] Indeed, appellees' contention that the government lacks a compelling interest in verifying eligibility, preventing and detecting fraud, and administering massive welfare programs effectively and efficiently borders on the frivolous. Appellees rely (Br. 20-21) on *Thomas* v. *Review Bd.*, 450 U.S. 707 (1981); and *Sherbert* v. *Verner*, 374 U.S. 398, 407 (1963), in which the Court held that avoidance of the *unsubstantiated potential* for fraud and abuse is not a compelling state interest. Here, by contrast, it is undisputed that fraud and abuse in federal welfare programs are real and substantial problems on which Congress has focused considerable attention. See, *e.g.*, Gov't Br. 15-17; J.S. App. 7a, 15a; J.A. 16-17. The SSN requirement attacked in this case is a direct congressional response to those problems. In short, it cannot seriously be urged that the government lacks a compelling interest in ensuring that expenditures of nearly $20 billion per year (see Gov't Br. 9) are properly made.

The other cases on which appellees rely for the proposition that "the government's interest in the integrity of welfare funds" (Br. 21) is not compelling are readily distinguishable on at least

---

[9] In *Stevens* v. *Berger*, 428 F. Supp. 896, 900-908 (E.D.N.Y. 1977), the court concluded that the government lacked a compelling interest in requiring AFDC applicants to supply SSNs, but the court confined its analysis to the governmental interest in requiring SSNs from the plaintiffs alone.

two separate grounds. First, the cases involved statutes that established arbitrary classification schemes rather than facially-neutral informational requirements. Second, the cases involved statutes that did not employ the "least restrictive means" of accomplishing the governmental interests at stake. This Court has never held, however, that the government lacks a compelling interest in verifying welfare eligibility and detecting fraud where, as here, that interest is achieved by a requirement that entails no classification of applicants and is precisely tailored to accomplish the governmental purposes.

In *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), for example, the Court invalidated one-year residency requirements imposed on the receipt of welfare benefits. Noting that the states admitted their intent to deny benefits to as many people as possible, the Court began with the proposition that the states' desire to exclude indigents had no legitimate purpose (394 U.S. at 628). In these circumstances, the Court held that the classification of welfare applicants on the basis of length of residence constituted invidious discrimination that infringed upon the constitutional right to travel. "If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional' " (394 U.S. at 631 (quoting *United States* v. *Jackson*, 390 U.S. 570, 581 (1968)). Here, by contrast, the SSN requirement was not enacted to penalize the exercise of constitutional rights and does not have as its purpose the exclusion of any particular class of potential recipients. Congress and the states are willing to provide benefits to eligible individuals, so long as they agree to identify themselves in terms that the government can utilize in the administration of the programs.

The Court in *Shapiro* also rejected the states' asserted purpose of preventing fraudulent claims not because it found that interest to be insubstantial, but because it concluded that the one-year residency requirement was simply not well-suited to that purpose. Thus, the Court concluded that erroneous double payments could be prevented without resort to the "blunderbuss method of denying assistance to all indigent newcomers for an entire year" (394 U.S. at 637). Again, the SSN requirement is quite different. Rather than a "blunderbuss method" that

sweeps too broadly, it is precisely tailored to achieve the purpose of preventing and detecting fraud and abuse. In sum, the Court invalidated the durational residency requirements in *Shapiro* because it found that the states "do not * * * need to use the one-year requirement for the governmental purposes suggested." 394 U.S. at 638. The same cannot be said of the SSN requirement.[9]

Similarly, in *Graham* v. *Richardson*, 403 U.S. 365 (1971), the statutes at issue created two classes of needy persons, "indistinguishable except with respect to whether they are or are not citizens of this country" (403 U.S. at 371). It was for that reason, and not because of any denigration of the state interest in fiscal integrity, that the Court invalidated a classification scheme based on alienage. The SSN requirement, on the other hand, creates no classification scheme at all; it applies equally to all who seek benefits.[10]

---

[9] In *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974), the county relied on arguments virtually identical to those rejected in *Shapiro* to support a one-year residency requirement for the provision of free medical care. Not surprisingly, the Court rejected the arguments in precisely the same terms it had employed in *Shapiro*.

[10] The free speech cases relied on by appellees (Br. 22 n.16) are equally inapposite. In *Schneider* v. *State*, 308 U.S. 147, 164 (1939), the Court refused to permit local police to censor pamphlets with the intent of weeding out fraudulent appeals in the name of charity and religion. The Court's concern, of course, was to guard against the censorship of ideas based on their content. No such impermissible discretion is vested in officials administering the AFDC and Food Stamp programs. In *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), the Court invalidated a provision of the Maryland Constitution requiring state officials to declare a "belief in the existence of God" (367 U.S. at 489). Quite clearly, no such "religious test" (*ibid.*) is involved in the SSN requirement. Finally, in *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), the Court concluded that less burdensome means existed to prevent fraudulent charitable solicitations than a flat ban prohibiting such activity by all groups that could not demonstrate that at least 75% of their receipts were used for charitable purposes. Of particular relevance to the instant case was the Court's observation that at least one feasible alternative was available through a provision of Illinois law requiring charitable organizations to register with the State Attorney General's Office and "to report certain information about their structure and fundraising activities." 444 U.S. at 638 n.12. Thus, far from suggesting that informational requirements are constitutionally infirm, the Court affirmatively endorsed their use as a valid means of promoting the governmental interest in preventing fraud.

Appellees also erroneously contend (Br. 23-26) that the government lacks a compelling interest in administrative efficiency. In large measure, appellees' argument is based on the apparent misconception that "administrative efficiency" is nothing more than a "bureaucratic craving for uniformity" (Br. 38). Clearly, the two are not the same. Rather, to the extent that uniformity is an issue, it is required to ensure that massive government programs are administered with the appearance and reality of evenhandedness and fairness, both for the participants in the programs and for the taxpayers funding those programs. Significantly, appellees have never denied that some sort of "system"—*i.e.*, something to promote administrative efficiency—is required to manage the programs at issue. Moreover, it cannot be denied that programs of the size here involved require a "system" that employs both computers and unique numerical identifiers. In these circumstances, it simply strains this Court's precedents too far to hold that appellees may require the government either to remove them from the "system" mandated by Congress or to devise an entirely separate "system" for handling their benefits.[11]

b. Once it is accepted that the government's interests in this case are compelling, it is clear that there simply are no "[less] restrictive means" (*Thomas* v. *Review Bd.*, 450 U.S. at 718) available to accomplish those interests. Before the government may be forced to abandon a facially-neutral informational re-

---

[11] As with the cases relied upon by appellees to attack the governmental interests in preventing and detecting fraud, the cases appellees cite (Br. 24-26) to challenge the government's interest in administrative efficiency involved facially arbitrary classification schemes broader than necessary to achieve the stated objective, rather than a precisely-tailored and neutral informational requirement of the sort at issue here. See, *e.g.*, *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632 (1974); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Spencer* v. *Rondell*, 357 U.S. 513 (1958).

Goldberg v. *Kelly*, 397 U.S. 254 (1970), also cited by appellees (Br. 25-26), involved only the procedures to be followed before welfare benefits may be terminated. Nothing in the decision suggests that the government's interest in fairly allocating such benefits must forever give way in the face of a continuing refusal on the part of a welfare recipient to comply with administrative procedures that fully comport with due process.

quirement such as the SSN provision—even for one individual—it must be shown that there exists an alternative that will be equally effective, *i.e.*, an alternative that works as well as the one already chosen by Congress.[14] As even the district court was forced to acknowledge (J.S. App. 20a-21a), however, exempting Little Bird of the Snow from the SSN requirement will diminish the government's ability to perform effective computer cross-matching, especially in situations involving records located in more than one state. Thus, exempting Little Bird of the Snow from the SSN requirement is not an "alternative" at all; it simply represents the district court's judgment that the government's compelling interests in verifying eligibility and detecting fraud and abuse must be compromised by eliminating the tool that Congress has determined to be the single most effective method of accomplishing those goals. This Court has never held that the "least restrictive means" analysis is to be applied in such a fashion.

c. Notably, this Court itself requires the use of SSNs in processing applications for admission to the Bar of the Supreme Court. In *Bornstrager* v. *Stevas*, 772 F.2d 419 (8th Cir. 1985), cert. denied, No. 85-719 (Dec. 2, 1985), the Clerk of this Court declined to process the application for admission to the Bar of this Court of a lawyer who refused on religious grounds to provide his SSN in the space reserved for that number on the application form. Although Bornstrager's suit against the Clerk was dismissed on procedural grounds, the reasons advanced by the Clerk for requiring applicants to provide their SSNs are remarkably similar to the governmental interests served by the

---

[14] We do not mean to suggest that the alternative must be the one that is most "convenient" for the government. Clearly, the Court's decisions in *Thomas* and *Sherbert*, requiring the states to grant unemployment benefits to persons unavailable for work because of their religious beliefs, made it more difficult to administer the benefit programs than was the case under the states' preferred method of excluding all religious objectors from eligibility for benefits. But the states still could achieve their interest in preventing fraudulent religious claims by evaluating each claim on its own merits. Thus, the states' purposes could be accomplished without resort to a "blunderbuss method" (*Shapiro* v. *Thompson*, 394 U.S. at 637) of blanket exclusions. The availability of this equally effective alternative serves to distinguish *Thomas* and *Sherbert* from the instant case. See also Gov't Br. 38.

SSN requirement in the administration of the AFDC and Food Stamp programs. In his memorandum in support of his motion to dismiss or for summary judgment (at 12), the Clerk noted that the SSN requirement serves the Court's interests in a variety of ways:

> It helps detect and prevent fraud by persons who are not qualified to gain admission to the Bar of the United States Supreme Court who might otherwise be admitted. It helps assure that disciplinary actions by the Supreme Court will not be mistakenly directed at the wrong person. It provides a means of easily verifying whether the person is a member of other courts' bars and the status of that membership. * * * Some type of precise identifier is very important to protect the public interest in regulating membership of the bar.

At the time of the district court litigation in *Bornstrager*, the Clerk stated that there were approximately 160,000 members of the Supreme Court Bar. Aff. of Alexander Stevas, ¶ 2, filed in support of motion to dismiss or for summary judgment. By contrast, there are, as noted in our opening brief (at 9), nearly four million families, with a total of more than 11 million persons, receiving AFDC payments each month, while approximately 20 million persons receive food stamps each month. If this Court requires SSNs to keep track of the attorneys admitted to practice before it, it should be self-evident that the government requires unique personal identifiers to keep track of AFDC and Food Stamp recipients.

3. Finally, appellees are unable to offer any satisfactory rationale to justify the district court's issuance of an injunction prohibiting Secretary Heckler (now Secretary Bowen) from "using or disseminating" the SSN that was assigned to Little Bird of the Snow at the request of her mother, appellee Miller. Appellees argue (Br. 47) that the Court should not reach the issue because the government did not raise it below. This contention is plainly wrong. First, it was not until the entry of the injunction itself that the government knew what form of relief would be granted. At that point, of course, the government did "object," by taking an appeal to this Court. Second, the government made it clear in the district court that it did not think that

any injunction should issue (J.A. 512). That position necessarily subsumed an objection to an injunction against governmental use or dissemination of Little Bird of the Snow's pre-existing SSN. Finally, there is no merit to appellees' speculation (Br. 47) that a more specific objection from the government would have induced the district court to order "expungement" of Little Bird of the Snow's SSN. More important, however, is the fact that even if appellees' supposition were correct, the government would have appealed any such order as well.

On the merits of this issue, appellees argue (Br. 47-48) that their religious beliefs would be equally infringed by governmental use of Little Bird of the Snow's SSN as by appellees' own compliance with the SSN requirement, reasoning that it would be appellees' act of applying for benefits that would trigger the government's use of Little Bird of the Snow's SSN. This recharacterization of appellees' objection does not advance their case.[13] Appellees cite no authority for the proposition that the Free Exercise Clause enables religiously-motivated citizens to force government to restructure the manner in which it conducts its own business. Moreover, by its own terms, the district court's injunction is not limited to governmental "use" or "dissemination" of Little Bird of the Snow's SSN that is arguably triggered by the actions of appellees. Instead, *any* use or dissemination has been permanently enjoined, no matter what the triggering cause. J.S. App. 24a. In addition, the district court ordered the Secretary of HHS to demand that all other entities, governmental and private, refrain from using or disseminating Little Bird of the Snow's SSN (*id.* at 25a).[14] Thus, for example, the injunc-

---

[13] Appellees' complaint sought to enjoin the government from denying AFDC or Food Stamp benefits "to Little Bird of the Snow for failure to provide a Social Security Number" (¶ 19 A, B; *see also* ¶ 28 A) (emphasis added). Appellees made no separate claim that the use or dissemination of an SSN already in the government's possession would violate their Free Exercise rights. Of course, the complaint was filed prior to the surprise revelation that Little Bird of the Snow's mother had in fact obtained an SSN for her and at a time when appellees were still falsely maintaining that she did not have one (*see* J.A. 13 (¶ 6)).

[14] This aspect of the district court's injunction does not expire on Little Bird of the Snow's 16th birthday; instead, it is permanent by its own express terms. J.S. App. 24a.

tion now in effect requires the Secretary to "demand" that the Internal Revenue Service permanently refrain from employing Little Bird of the Snow's SSN to determine whether she has unearned income from bank accounts on which back taxes are owed. There is no conceivable rationale for such unprecedented interference with the operations of government.

For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JANUARY 1986

No. 84-780

IN THE

Supreme Court of the United States

October Term, 1985

SUPREME COURT, U.S.
FILED
SEP 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Appellants,

v.

STEPHEN J. ROY, et al.,

Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OF THE RUTHERFORD INSTITUTE, THE RUTHERFORD INSTITUTE OF ALABAMA, THE RUTHERFORD INSTITUTE OF GEORGIA, THE RUTHERFORD INSTITUTE OF MINNESOTA, THE RUTHERFORD INSTITUTE OF MONTANA, THE RUTHERFORD INSTITUTE OF TENNESSEE, THE RUTHERFORD INSTITUTE OF TEXAS, AND THE RUTHERFORD INSTITUTE OF VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE APPELLEES

John W. Whitehead
Counsel of Record
James J. Knicely
D. Kevin Shumberry
The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0200

Thomas G. Sorrow
The Rutherford Institute
of Alabama
517 North Hull Street
Montgomery, Alabama 36104

Randall E. Bird
William D. Hallberg
The Rutherford Institute
of Georgia
1750 Peachtree Rd., N.W.
Atlanta, Georgia 30309

Tony P. Trimble
The Rutherford Institute
of Minnesota
316 East Main
Anoka, Minnesota 55303

J. Douglas Alexander
The Rutherford Institute
of Montana
104 Second Avenue, S.W.
Sidney, Montana 59270

Jon Bailey
The Rutherford Institute
of Tennessee
720 East Sullivan Street
Kingsport, Tennessee 37660

W. Charles Bundren
The Rutherford Institute
of Texas
6300 Interfirst One
Dallas, Texas 75202

Guy O. Farley, Jr.
The Rutherford Institute
of Virginia
10521 Judicial Place
Fairfax, Virginia 22030

Attorneys for Amici Curiae

TABLE OF CONTENTS

PAGE

Table of Authorities iii

Interest of Amici Curiae 1

Statement of Facts 2

Summary of Argument 3

Argument

I. The Government's Denial of Public Benefits For Little Bird Of The Snow Exerts An Unconstitutional Condition Upon Appellees' Religious Liberty 5

II. The Appropriate Standard In This Case Is The Compelling Interest-Least Restrictive Means Standard Enunciated In *Sherbert v. Verner*, Not The Balancing Approach Set Forth In *Wisconsin v. Yoder* 8

A. The Court Applied The Correct Free Exercise Standard In The Present Case 11

B. Ad Hoc Balancing Is Inappropriate In This Case Because It Inadequately Values An Individual's Right To The Free Exercise Of Religion 14

III. *United States v. Lee* Is Inappropriate For The Resolution Of This Case

A. The Facts of *Lee* Restrict Its Application To Claims Of Tax Exemption Not To Claims For Government Benefits 16

B. *United States v. Lee* Is Sui Generis As A Precedent In Free Exercise Cases 21

Conclusion 24

TABLE OF AUTHORITIES

Cases

PAGE

Braunfeld v. Brown, 366 U.S. 599 (1961) 18, 22, 23

Brown v. State, 669 S.W.2d 441 (Ark. 1984) 10

Delconte v. North Carolina, 65 N.C. Ct. App. 262, 308 S.E.2d 898 (1983) 10

Jacobs Marsh & Sons, Inc. v. NLRB, 676 F.2d 975 (3rd Cir. 1982) 21

Jensen v. Quaring, 53 U.S.L.W. 4787 (U.S. June 17, 1985) 7

Jernigan v. State, 412 So.2d 1242 (Ala. 1982) 10

Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984) 7

Ray v. Cohen, 590 F. Supp. 600 (M.D. Pa. 1984) 6-8, 11-16, 19, 20, 22, 23

Sherbert v. Verner, 374 U.S. 398 (1963) 3, 6, 7, 8, 9, 12-15, 22, 23, 24

Speiser v. Randall, 357 U.S. 513 (1958) 7

State v. Rivinius, 328 N.W.2d 220 (N.D.1982) 10

Thomas v. Review Board, 450 U.S. 707 (1981) 3, 7, 10, 12-14, 18, 22-24

Trenton Ruthers Home for Children v. NLRB, 677 F. 2d 302 (3rd Cir. 1982) 21

United States v. Lee, 455 U.S. 252 (1982) 3, 15, 16, 19-23

West Virginia v. Riddle, 285 S.E.2d 359 (W.Va. 1981) 10

Wisconsin v. Yoder, 406 U.S. 205 (1972) 3, 7, 9, 11, 14

Statutes

26 U.S.C. 1402(g) (1979) 17

Federal Insurance Contributions Act, Pub. L. No. 591, 68A Stat. 415 (1954) 17

Federal Unemployment Tax Act, Pub. L. No. 591, 68A Stat. 439 (1954) 18

Other Sources

Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. 327 (1969) 14, 15

Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development-Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381 (1967) 3, 12, 14

Mansfield, *The Religion Clauses of the First Amendment Amid the Philosophy of the Constitution*, 72 Calif. L. Rev. 847 (1984) 21

Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 Duke L. J. 1217 ..... 10, 14, 15

Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545 (1983) 11

Note, *United States v. Lee: An Insensitive Approach to the Free Exercise of Religion*, 18 Tulsa L. J. 305 (1982) 9, 15, 22, 23

Note, *United States v. Lee: Limitation on the Free Exercise of Religion*, 28 Loyola L. Rev. 1216 (1982) 22

Shotzer, *Exemptions and Privileges on Grounds of Religion and Conscience*, 62 Ky. L. J. 377 (1974) 22

Smith, *The Constitution and Autonomy*, 60 Tex. L. Rev. 175 (1982) 22

IN THE

Supreme Court of the United States

October Term, 1985

No. 84-780

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Appellants,

v.

STEPHEN J. ROY, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OF THE RUTHERFORD INSTITUTE, THE RUTHERFORD INSTITUTE OF ALABAMA, THE RUTHERFORD INSTITUTE OF GEORGIA, THE RUTHERFORD INSTITUTE OF MINNESOTA, THE RUTHERFORD INSTITUTE OF MONTANA, THE RUTHERFORD INSTITUTE OF TENNESSEE, THE RUTHERFORD INSTITUTE OF TEXAS, AND THE RUTHERFORD INSTITUTE OF VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE APPELLEES

INTEREST OF AMICI CURIAE[1]

This case presents important issues concerning the rights of recipients of governmental benefits. This Court has long recognized the principle that general welfare benefits

[1]Counsel of record to the parties in the case described above have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

must be dispensed without the imposition of special burdens on the free exercise rights of the recipients thereof, particularly when there are less restrictive means to accomplish the governmental objective. In this case, free exercise rights should not be subordinated to the inferior governmental interest in the efficiency or administrative convenience of its welfare system. The Rutherford Institute believes that the decision of the District Court was correct and should be upheld.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. With state chapters in Alabama, Georgia, Minnesota, Montana, Tennessee, Texas and Virginia and its national office in Manassas, Virginia, The Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to First Amendment religious freedoms. Counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amici curiae adopt by reference the statement of facts as set forth in Appellees' brief filed with this Court.

SUMMARY OF ARGUMENT

The mandatory assignment of a Social Security number and the threatened denial of benefits to Appellees constitutes an impermissible burden upon the free exercise of Appellees' religious beliefs. The Government cannot condition the availability of public benefits upon conduct mandated by Appellees religious beliefs, thereby causing them to modify their behavior or violate their beliefs. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Board*, 450 U.S. 707 (1981). The governmental

interest in assigning Social Security numbers is not of the "highest order," but is limited, as in *Sherbert* and *Thomas*, to preventing fraudulent welfare claims and maintaining correct claimant information. This interest, unlike those found in *Wisconsin v. Yoder*, 406 U.S. 204 (1972) (universal education) and *United States v. Lee*, 455 U.S. 252 (1982) (payment of taxes), can hardly be described as "compelling." Moreover, the Government has other viable, less restrictive means available to accomplish its objectives. As such, Appellees' sincere religious belief should not be unduly burdened when there are alternative forms to achieve the governmental objectives. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

United States v. Lee, 455 U.S. 252 (1982) is not dispositive in this case. *Lee* involved the paramount governmental interest in preserving the system of taxation. Granting exemption from payment of taxes would otherwise have subjected the governmental revenue base to a wide variety of religious beliefs. In contrast, the present case is limited to the mere administrative concerns of preventing fraudulent claims and erroneous welfare payments.

ARGUMENT

I.

The Government's Denial Of Public Benefits For Little Bird Of The Snow Exerts An Unconstitutional Condition Upon Appellees' Religious Liberty.

In free exercise cases where the Government withholds benefits because of an individual's adherence to religious beliefs, the issue is raised whether the State is withholding benefits on the basis of an unconstitutional condition. To comply with the Government's requirement to obtain benefits would sacrifice free exercise rights to the Government. Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development - Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1400 (1967). This Court has struck down unconstitutional conditions in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Board*, 450 U.S. 707 (1981), and has consequently exempted claimants from compromising their beliefs for benefits. Otherwise, the State would have "purchased" constitutional rights with its interest in providing welfare benefits. This Court should follow these precedents and exempt Appellees from furnishing their daughter's Social Security number to the welfare department.

This Court succinctly described the debilitating effect of an unconstitutional condition upon a claimant of free exercise rights in *Thomas*. "Where the state conditions receipt of an important benefit upon conduct proscribed by religious faith, or where it denies such a benefit because of conduct mandated by religious belief," the Government wields substantial pressure upon the claimant to modify his conduct and to compromise his religious belief. 450 U.S. at 717-18. In *Thomas*, this Court held that the Government could not withhold unemployment benefits from an individual who asked to be laid off because the

work violated his religious belief. Implicitly, this Court in *Thomas*, relying on *Sherbert*, concluded that for the First Amendment to meaningfully protect religious liberty, it must secure the means of an individual's religious expression. *Id.* at 718. However, the expression must not pose a "substantial threat to public safety, peace, or order." *Sherbert*, 374 U.S. at 403.

Appellee Roy's religious belief impels him to refuse to furnish Little Bird of the Snow's Social Security number to the welfare department. 590 F. Supp. at 605. As in *Sherbert*, the exerted pressure on the eligible beneficiary to conform is "unmistakable." 374 U.S. at 404. With a family at near-subsistence level, no welfare benefits for Little Bird of the Snow, and then no benefits for Little Bird of the Snow's medical expenses, Appellees undoubtedly feel the pressure. 590 F. Supp. at 607. However, Appellees have strictly followed their religious conviction and resisted the pressure. *Id.*[5]

---

[5] Similar to *Thomas* and *Sherbert*, the Government attempted to mold Appellees' conduct into a classification for eligibility. *Id.* at 604. After receiving benefits for Little Bird of the Snow for four months, the welfare department informed Appellee of the Social Security number requirement as "a condition for eligibility for benefits." *Id.* at 605. Appellees offered to cooperate with the welfare department in finding alternative solutions for his refusal to produce the Social Security number. *Id.* However, the welfare department refused the opportunity even after initially forcing Appellees to accept the number's dormancy and then providing the benefits without notifying Appellees of the problem or of the "active" nature of the Social Security number. *Id.*

The Government partially succeeded in classifying Appellees by establishing a Social Security number for Little Bird of the Snow contrary to their wishes. *Id.* at 604. However, Appellee Roy did not modify his belief or practice after realizing the value of the benefits Appellees would lose for Little Bird of the Snow. *Id.* at 605.

In the present case, the Government conditioned the benefits upon Appellee Roy's susceptibility to "'violate a cardinal principle'" of his religious faith for his daughter's welfare. *Sherbert*, 374 U.S. at 406. In *Sherbert* this Court recognized that the Government's "'imposition of such a condition . . . threatened to produce a result which the State could not command directly.'" *Id.* at 405-06, *quoting Speiser v. Randall*, 357 U.S. 513, 526 (1958). Likewise, in the present case, the Government's uniform pattern of identification for applicants does not permit any deviation, even at the expense of violating Appellees' religious liberty, but rather accomplishes indirectly what the State could not otherwise constitutionally command directly. 590 F. Supp. at 605. This is so because viable alternatives exist to further the state's interest. 590 F.Supp. at 613. An unconstitutional condition cannot be justified where there are less restrictive means of achieving the Government's end. *See Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Thomas v. Review Board*, 450 U.S. 707, 718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972); *see also Quaring v. Peterson*, 728 F.2d 1121, 1126 (8th Cir. 1984), *aff'd by an equally divided Court, Jensen v. Quaring*, 53 U.S.L.W. 4787 (U.S. June 17, 1985).[9] The Government's interest in preventing fraudulent claims and

---

[9] In *Jensen v. Quaring*, the Eighth Circuit held that Nebraska's Department of Motor Vehicles could not require an applicant to submit to having a photograph taken for affixing on the license if the applicant objected to the photograph based on religious beliefs. The court concluded that the requirement was an unconstitutional burden on Quaring's practice of her belief. 728 F.2d at 1125 (*citing Thomas*, 450 U.S. at 717). Under the court's analysis, the pressure on Quaring was "indistinguishable" from the burden on Sherbert. *Id.*

Moreover, the exemption desired by Quaring would not "impair the state's ability to achieve its objective." *Id.* at 1126. Primarily, the court noted the Government's grant of several selective exemptions

maintaining correct claimant information can be achieved without requiring Little Bird of the Snow's Social Security number. 590 F.Supp. 607. Exempting Little Bird of the Snow conceivably would require very minimal personnel time without discrete financial expense. *Id.* at 613. It is not an exemption that would render Pennsylvania's welfare statutory scheme "unworkable." *See Sherbert*, 374 U.S. at 408-409. The minimal exemption in the present case, compared to the Government's unyielding claim of compelling interest, exposes the unconstitutional condition imposed by the Government on Appellees' sincerely held religious belief.

II.

The Appropriate Standard in This Case is the Compelling Interest-Least Restrictive Means Standard Enunciated in *Sherbert v. Verner*, Not the Balancing Approach Set Forth in *Wisconsin v. Yoder*.

Sherbert v. Verner, 374 U.S. 403 (1963), stands as the watershed case for establishing a lucid test of competing interests in the free exercise area. The "compelling state interest-least restrictive means" test announced in *Sherbert* has been successful in establishing a proper and workable balance between compelling Government inter-

---

(footnote 3 continued)

from the photograph requirement. *Id.* For example, the Government allowed learner's permits and special permits for minimal driving to be used without a photograph. *Id.* Therefore, the Government's interest in the public safety and administrative convenience had already been achieved through the lesser restrictive alternatives urged by Quaring. *Id.* Without probing into the credibility of Quaring's belief, the State would be imposing an unconstitutional condition upon the issuance of the license. *Id.* at 1127; *see also United States v. Ballard*, 322 U.S. 78, 85-88 (1944) (questions of truth or falsity of a religious belief properly withheld from a jury in a fraud case).

ests and individual religious liberty interests. Note, *United States v. Lee: An Insensitive Approach to the Free Exercise of Religion*, 18 Tulsa L.J. 305, 320 (1982) (hereinafter Note).

Sherbert's fresh approach to free exercise claims has survived any confinement to its particular facts. In *Wisconsin v. Yoder*, 406 U.S. 204 (1972), the Court reaffirmed the test, but further refined its application and scope by balancing an acknowleged compelling State interest against the sincerely held religious Amish belief. The State's interest in compulsory education was recognized as being at "the very apex" of the State's function. *Id.* at 213. However, the Court subjected this important State interest to a balancing test (*Id.* at 214) ruling that the only State interests that could overbalance legitimate free exercise claims were those of "the highest order and those not otherwise served." *Id.* at 215., (citing *Sherbert, supra*). As this Court viewed the State's interest in education, it realized that the interest's strength could not preclude comparison to other interests protected by the Constitution.*

After acknowledging the significance of universal education, this Court took judicial notice of Amish self-sufficiency learned through informal, vocational education and the impotency of two additional years of public education for preparing children for their way of life or

---

*The quality of Amish claim in *Yoder* required this Court to balance a neutral law's application advancing important State interests against undue individual discrimination infringing on individual religious liberty interests. 406 U.S. at 220. The Court's concern in *Yoder* for unconstitutional applications of a neutral law broadened *Sherbert*'s protection of free exercise, going beyond mere facial examination of a regulation and its underlying interest. *See* Note, *supra*, at 316, n. 74.

effective participation in society. *Id.* at 213-23. Finding an absence of proof supporting the magnitude of the State's risk in forfeiting two years of an Amish child's public education, and the existence of viable, less restrictive alternatives in the Amish tradition, history and way of life, the Court found that in the circumstances presented, even the compelling State interest in universal education was not sufficient to override the free exercise violation against the Amish.[9]

Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981), silenced any conceivable irreconciliation between the *Sherbert* compelling State interest-least restrictive means test and the *Yoder* balancing test. Relying on both *Sherbert* and *Yoder*, this Court reversed Indiana's denial of unemployment benefits to Thomas who had quit his job for religious reasons. *Id.* at 720.

After finding an infringement of a sincerely held religious belief, this Court looked for any justification of the incursion through a compelling interest-least restrictive

---

[9]The unique facts of *Yoder* and this Court's detailed emphasis on their embedded cultural and religious traditions has led some lower courts to confine Yoder's rationale. E.g. *Brown v. State*, 469 S.W. 2d 441 (Ark. 1984); *State v. Riviera*, 328 N.W.2d 220 (N.D. 1982); *West Virginia v. Riddle*, 285 S.E.2d 359 (W.Va. 1981); *Jernigan v. State*, 412 So.2d 1243 (Ala. 1982); *Delconte v. North Carolina*, 65 N.C. Ct. App. 262, 308 S.E.2d 898 (1983). However, the thorough enumeration of Amish traditions, history, and beliefs did not define the *sine qua non* for religious exemption in the free exercise area. Instead, this Court used the Amish model to illustrate the sincerity and the functional quality of their religious beliefs for purposes of comparison to the asserted State interests. Marcus, *The Forum of Conscience: Applying Standards Under The Free Exercise Clause*, 1973 Duke L.J. 1217, 1230.

means test. *Id.* This Court compared the State's interest in *Thomas* to the rejected interest in *Sherbert*, i.e., the integrity of the public insurance fund. *Id.* at 719, n. 12. Consequently, no compelling State interest was found that would justify the violation of Thomas' free exercise. *Id.*

In each of these three cases, a "'compelling State interest-least restrictive alternative'" test has been uniformly applied to determine the strength of the competing interests. *See* Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545, 546 (1983). *Yoder* goes one step further to require balancing to determine whether a compelling state interest, once found, is sufficient to override a bona fide free exercise claim.

A. The Court Applied The Correct Free Exercise Standard In The Present Case.

In this case, the lower court struck a middle ground between the parties when it labeled the governing standard as a "'reasonable less restrictive means'" test. 590 F. Supp. at 611. Acknowledging the Government's strong general interest in maintaining the integrity of the Social Security number, it nevertheless concluded that the Appellees would prevail if lesser restrictive alternatives could be used without unreasonable cost to the Government. *Id.* Superficially, the court below made reference to a cost/benefit analysis, but otherwise, the court's test resembled the conventional compelling interest-least restrictive means test.

Although the lower court did not discern whether all the available alternatives to the Social Security number were reasonable compared to others, nor actually employ a cost/benefit analysis (*id.* at 612-613), it did explore the exemption as one possible alternative and found the viability of the exemption to be well-founded because the

resulting harm to the State would be remote. *Id.* With a viable alternative existing, the State's denial of benefits could not *ipso facto* be the least restrictive means available to further its interest.

This type of analysis follows precisely the analysis in *Sherbert* and *Thomas*. The court analyzed the sincerity and credibility of Appellees' religious belief, the weight of the Government's interest, the irrelevance of administrative convenience, and the infringement of Appellees' free exercise of religion.* The Government's interest in using computer systems and the Social Security number was found to be substantial, not "essential" or compelling on its face. 590 F. Supp. at 610, 613. The chief reason why the Government's interest should not prevail is because there

---

*The *Yoder* balancing approach was not necessary in this case because of the absence of a compelling State interest. *Yoder* focused on the interplay between the interests because the implementation of an acknowledged compelling State interest was threatened, not merely the integrity of a lesser interest as in *Sherbert* and *Thomas*. In the latter two cases, this Court used a compelling interest-least restrictive means analysis because the religious exemption actually advanced the fundamental purpose of the public benefit laws. *See generally* Giannella, *Religious Liberty, Non-establishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1401 (1967). Similarly, in this case, the exemption for Appellee Roy would fulfill the Government's purpose of alleviating individual hardship. On the other hand, the *Yoder* approach went further and emphasized the depth of the Amish commitment to isolationism, and the ways in which the Amish practices actually advanced the State's interest rather than impeded it. The Court in all three cases searched for a compelling interest, but found one only in *Yoder*, thereby necessitating the further balancing of the state and individual religious liberty interests.

are lesser restrictive means available to practically achieve the goal of alleviating individual hardship as in *Sherbert* and *Thomas*. For example, the requirement of identifying factors for Little Bird of the Snow other than the Social Security number and the uniqueness of her name would supply the Government's need for exact identification. *Id.* at 613. In contrast to *Sherbert* and *Thomas*, these alternatives, in effect, a *partial* exemption, are more viable than wholesale exemption from participation in the Social Security system. As this Court has stressed, where there are alternatives acceptable to both parties, courts should always grant the exemption in favor of free exercise of religion.

[A] key phrase in *Sherbert*'s least restrictive means standard is that "no alternative forms . . . [exist to] combat [anticipated] abuses." 374 U.S. at 407. Essentially, this is the thrust of the "reasonable less restrictive alternatives" test in the lower court's analysis. This standard will not allow the Appellees to prevail unless the Government's interest cannot be substantially furthered in at least some other practical way.

The facts and the formulation of issues in the present case necessitate the use of the analysis set forth in *Sherbert* and *Thomas*. Appellees' application for benefits is to lessen the hardship on Little Bird of the Snow. The denial of these benefits is based solely on their religious practice of refusing to furnish Little Bird's social security number. 590 F. Supp. at 60[4]. As in *Thomas* and *Sherbert*, this denial creates an unconstitutional condition on the receipt of public benefits. Even the Government's interest in the integrity of the public benefit system is identical in these cases.

More importantly, Appellee Roy's belief is sincerely religious, central to his membership in the Native American Indian tradition and greatly affects his daily

life. Id. at 604-05. The quality of his claim equals or may surpass the claim of infringement in *Yoder*, 406 U.S. at 216. The Abenaki tradition of burying a child's placenta protects the child's autonomy. 590 F. Supp. at 604-05. Control is "indispensable to becoming a holy person." The use of computers would rob Little Bird of the Snow of that control. *Id.* Appellee Roy's belief is not one "so bizarre, so clearly nonreligious" as not to require protection. *Thomas*, 450 U.S. at 715. This belief is common to the Native American Indians, a culturally bound group older than the Amish. *See Yoder*, 406 U.S. at 210. Even the apparent inconsistency within Appellees' religious practices cannot defeat their claim. 590 F. Supp. at 610. Appellee Roy, as a father, has drawn a line for Little Bird of the Snow's welfare because of his religious belief. *Accord, Thomas*, 450 U.S. at 715. This line compelled Appellee Roy to sacrifice daily the benefits from the Social Security Administration. 590 F. Supp. at 610. Unlike the facts of *Yoder*, Appellee Roy attempts to live *in* a society "at odds" with his traditional religious beliefs. *Id.* Therefore, the nature of the benefits, Roy's conviction ,and his willingness to adapt to modern society like those involved in *Sherbert* and *Thomas*, require this Court to apply the analysis found in those cases.

B. Ad Hoc Balancing Is Inappropriate In This Case Because It Inadequately Values An Individual's Right To The Free Exercise Of Religion.

Mere balancing of competing interests is not appropriate in this case for a number of reasons. First, as in *Sherbert* and *Thomas*, there is no State interest of the "highest order." *See Thomas v. Review Board*, 450 U.S. at 718. Moreover, as the lower court in this case indicated, the mere formless balancing of particular facts "would

effectively guarantee victory for the government in every case." 590 F. Supp. at 611. Ad hoc balancing frames issues in broad terms that encourage subjectivity and is appropriate only for those cases involving the conflict of constitutional rights and obligations of the highest magnitude. *Yoder*, 406 U.S. at 213, 215; Marcus, *supra*, at 1240; *see also* Gianella, *supra*, at 1383-84; Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. 327, 330, 332 (1969).

In the absence of a potentially overriding governmental interest, some restraint is needed to stabilize the individual's interest against the State interest because it is more than mere coincidence "that the government usually prevails." Marcus, *supra*, at 1241. The compelling interest-least restrictive means test advanced by *Sherbert* best achieves a stable structure in the free exercise area requiring an evaluation of available alternatives, if any, to achieve the governmental objective. *Id.* Because administrative problems and efficiency constitute the core of the Government's interest in the present case(590 F. Supp. at 612, 613). The existence of workable administrative alternatives diminishes the Government's interests, and properly values Appellees' free exercise rights.

Second, a "balancing" test is inconsistent with the constitutional principle of recognizing exemptions from universally applied laws where the law conflicts with sincerely held religious beliefs. *Id.* at 611. This pitfall in a wholesale application of the balancing approach detracts from the consideration of valid individual rights of free exercise and the value of that right to the individual. Clark, *supra*, at 337. "The cost to a principled individual of failing to do his moral duty is severe, in terms of supernatural sanction or loss of moral self-respect." *Id.* Such is the plight of Appellees and their continued refusal to comply is more than inevitable. It is involuntary. Clearly, this Court should not depreciate Appellees'

belief, as the Government urges, through a blind invocation of a "balancing" test.

Finally, a balancing approach engenders dangerous generalizations that, in effect, often determine the outcome. Note, *supra*, at 333-334. For example, in *United States v. Lee*, 455 U.S. 252 (1982), this Court gave short shrift to the impact of Government's denial of a tax exemption on the religious practices of the Amish. Instead, the Court glossed over the probable impact on individual liberties, motivated by the "common good" derived from a system of taxation. 455 U.S. at 259. This somewhat indiscriminate approach cheapens the value of free exercise claims similar to Appellees'. Exceptional claims, like Appellees', should at least be entitled to consideration for constitutionally required exemptions granted after the most specific analysis available.

III.

United States v. Lee Is Inappropriate For The Resolution Of This Case.

The Government in this case relies primarily upon *United States v. Lee*, 455 U.S. 252 (1982) as dispositive of the issues. Indiscriminate application of *United States v. Lee*, however, ignores three significant distinctions between *Lee* and the present case. First, the factual pattern in *Lee* circumscribes its holding to issues involving *payment* or *nonpayment* of taxes. Second, the potential harm to the Government in *Lee* was immediate and concrete whereas any harm to the Government in this case, as the court below found, would be remote. 590 F. Supp. at 611-12. Third, the dominance of the tax issue in *Lee* is in stark contrast to the severity of the free exercise claim in this case. Note, *supra*, at 325.

A. The Facts of *Lee* Restrict Its Application To Claims Involving Exemption From Payment Of Taxes, Not To Claims For Governmental Benefits.

In *Lee*, a member of the Old Order Amish had hired other Amish to work with him in his carpentry shop and on his farm. Although Lee's income from self-employment was exempt from social security taxes under the provision for persons religiously opposed to public insurance (26 U.S.C. 1402(g) this exemption did not relieve him from tax liability for failure to withhold taxes assessed on employees' wages. Federal Insurance Contributions Act (F.I.C.A.), Pub. L. No. 591, 68A Stat. 415 (1954) (codified at 26 U.S.C. 3101-26); Federal Unemployment Tax Act (F.U.T.A.), Pub. L. No. 591, 68A Stat. 439 (1954) (codified at 26 U.S.C. 3101-11). Since 1970, *Lee* had failed to file the required quarterly returns, failed to withhold the F.I.C.A. tax from the employees' wages and failed to pay his share of the F.I.C.A. and F.U.T.A. excise tax. 455 U.S. at 254. Thereafter, the Internal Revenue Service assessed liability and Lee sued for a refund on the basis of a violation of his and his employees' free exercise of religion. 455 U.S. at 255.

The district court applied a "compelling interest-least restrictive means" test and upheld Lee's claim of unconstitutional restraint on his free exercise of religion. *United States v. Lee*, 497 F. Supp. 180, 184 (W.D. Pa. 1980). Specifically, the court found that the Government's loss of revenue would be negligible and that the Amish provided services for their members to displace the need for Government assistance. *Id.* at 183. Combining these two facts, the court held that the resulting burden on Lee's free exercise outweighed the Government's interest. *Id.*

On appeal, this Court reversed the district court after dismissing Lee's entitlement to the statutory exemption.

Therefore, the issue was whether Lee should be constitutionally exempt from the tax. This Court framed the initial inquiry in terms of whether the payment of social security taxes and receipt of benefits interfered with Lee's free exercise rights. After noting pertinent Amish beliefs and refusing to be "arbiter of scripture," the Court acknowledged perfunctorily that the compulsory participation in the tax system violated Lee's free exercise rights. 455 U.S. at 257 (*citing Thomas v. Review Board of Indiana Employment Security*, 450 U.S. 707, 716 (1981)).

Second, this Court recognized that the mere existence of a burden was not decisive, but that an "overriding government interest" could justify an infringement of Lee's free exercise. 455 U.S. at 257-58 [*] This Court concluded that the governmental interest in a nation-wide tax program based on complex actuarial factors was obvious. *Id.* Discussion of this "very high" interest disclosed the powerful influence of the tax undercurrent. Implicitly, the decision hinged upon the system's vitality because of its comprehensive and mandatory nature. *Id.*

Third, this Court inverted the free exercise analysis to determine whether Lee's belief would "unduly interfere" with the Government's interest. *Id.* at 259. Even though the Court acknowledged possible accommodation of religious beliefs, it specifically emphasized the difficulty in accommodating religious beliefs involving the payment of taxes. *Id.*, *quoting Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). The Court noted that granting an exemption to the obligation to pay Social Security taxes is different because

---

[*] Somewhat surprisingly, the Court cited *Thomas* and *Sherbert v. Verner*, 374 U.S. 398 (1963), to support its reasoning. These cases, however, employed a "compelling interest-least restrictive means" standard to invalidates a burden on free exercise. Note, *supra*, at 321-20.

there is no principled distinction between payment of Social Security taxes and payment of taxes in general. As such, the entire revenue base of Government would be in jeopardy from a wide variety of religious beliefs.

The resolute indicia of *Lee*'s limited holding is apparent from this Court's expressed view of the facts in that case. In *Lee*, the Government's interest was to raise taxes from voluntary commercial activity not to compel the acceptance of benefits.[9] However, in the present case, the purpose of a Social Security number is for governmental convenience to guard against fraudulent claims or erroneous payments based on misidentification. 590 F. Supp. at 606-07. Needless to say, a religious exemption from paying taxes on a voluntary commercial activity contrasts sharply with a religious exemption from using a Social Security number to obtain welfare. In the present case, there is no evidence to indicate an unmanageable number of claims similar to Appellee Roy's. 590 F. Supp. at 612. Moreover, the Government has viable alternatives both to further its administrative objectives and to accommodate the religious beliefs. The alternative to a number would be simply to use Appellees' daughter's unique name, Little Bird of the Snow, or utilize other family member's numbers. Both interests of the parties would be assuaged because no evidence exists of another applicant named "Little Bird of the Snow." *Id.* at 613. Even assuming another does exist, the opportunity for fraud remains minimal due to the Government's requirement of other identification accompanying the applicant's name. *Id.* Moreover, Little Bird of the Snow epitomizes a "narrow category that is readily identifiable" for purposes of administrative manageability

[9]The Court described Lee's actions as a voluntary choice of entering a commercial venture and assuming the status and obligations of an employer. 455 U.S. at 261.

by virtue of her unique name and identifying factors. *See United States v. Lee*, 455 U.S. at 260-261.

Unlike the plaintiff in *Lee*, Appellee Roy's refusal to provide a Social Security number for Little Bird of the Snow generates, at most, a speculative adverse impact on the Government's interest in efficiency. Interface between the welfare program and computer necessitate the use of digital characters for efficiency. 590 F. Supp. at 610. However, the Federal Government requires the furnishing of Social Security numbers as a condition of eligibility for Government assistance. *Id.* at 605. This latter requirement implies that the number is needed for mere operation of the program (not just its efficiency). Yet, the welfare department admitted that it can distribute benefits and protect against fraud without using the computers. *Id.* at 613. Only one situation in an interstate context would generate difficulty and its occurrence is remote. *Id.* The Government's requirement of a Social Security number, although lessening the workload on the welfare department for its extensive welfare rolls, does not void the Government's interest in providing a welfare system, as an exemption from taxes in *Lee* would have eliminated part and threatened all of the tax system. The Government's interest in the present case, therefore, is greatly diminished in comparison to *Lee*.[9]

---

[9]Unlike Lee's free choice, Appellee Roy did not freely choose to participate in the issuance of a number to Little Bird of the Snow. After Little Bird of the Snow's birth, her mother signed an application for the number without Appellee Roy's knowledge and without remembering her actions. 590 F.Supp. at 604. Once the Social Security Administration issued the number, Appellees desired to revoke it, but instead the Administration rendered it "dormant." *Id.* Also, Appellee Roy refused to participate in the number's usage and willingly tried to offer an alternative to ameliorate the refusal, but the Government rejected any cooperative effort and denied the welfare benefits. *Id.* at 605.

The Government's inflated interest in administrative convenience pales beside Appellees' legitimate free exercise claim of caring for their daughter in the religious tradition of the Abenaki Indians. In *Lee*, the plaintiff freely chose to participate in a highly regulated activity. The Government had accommodated Lee's personal religious belief against *personal* payment of self-employer's income tax. However, Lee actually asserted objection to payment of taxes on behalf of *his employees*. 455 U.S. at 261-62. Even though the employees were Amish, it is unclear whether their beliefs paralleled Lee's Old Order Amish beliefs. *See* Mansfield, *The Religion Clauses of the First Amendment Amid the Philosophy of the Constitution*, 72 Calif. L. Rev. 847, 902 (1984). Indirectly, at least, this Court did not grant Lee a constitutional exemption because he did not have associational standing to assert employees' rights. *Id.*[10] By contrast, in this case Appellees' objections are not vicarious, but directly personal to them.

B. *United States v. Lee* Is *Sui Generis* As A Precedent In Free Exercise Cases.

In his concurrence, Justice Stevens observed three problems with this Court's test in *Lee* which suggests its uniqueness and limited application. *See* 455 U.S. at 262-63 (Stevens, J., concurring).

---

[10] *Accord, Jacobo Marti & Sons, Inc. v. NLRB*, 676 F.2d 975 (3rd Cir. 1982) (citing *Lee* in holding that a cheese producing plant employing both Amish and non-Amish could not prohibit unionizing because of Amish employees' religious tenets); *Tressler Ruthera Home for Children v. NLRB*, 677 F.2d 302, 306-07 (3rd Cir. 1982) (preventing unionization of Lutheran House would not violate non-Lutheran worker's right to unionize).

First, Appellees and Little Bird of the Snow represent a "limited class of disadvantaged persons" (*Id.* at 263, n. 3) who should not be judged with standards utilized for neutral laws of general applicability, but on a case-by-case exemption basis. Second, this Court in *Lee* extracted decisive factors from *Braunfeld v. Brown* and engendered a hybrid standard of review that is, in any event, inappropriate to this case. Note, *United States v. Lee: Limitation on the Free Exercise of Religion*, 28 Loyola L. Rev. 1216, 1223 (1982) (hereinafter *Limitations*). Third, the present case, like *Sherbert, and Thomas*, mandates a compelling interest-least restrictive means standard of review. 455 U.S. at 263, n. 3 (Stevens, J., concurring).

The grant of a religious exemption from neutral laws assumes a more justifiable approach when public welfare is at stake. *See generally* Shetreet, *Exemptions and Privileges on Grounds of Religion and Conscience*, 62 Ky. L. J. 377 (1974). In this regard, it is not inappropriate to analyze the motivation for exemption from requirements imposed in connection with public benefits programs. 455 U.S. at 268, n. 3 (Stevens, J., concurring). In the present case the only motivation for Appellees' action consists of a free exercise claim amid a need to provide for Little Bird of the Snow. 590 F. Supp. at 605. Together, these two life forces signify personal freedom protected by the Constitution in the context of material need. *See generally* Smith, *The Constitution and Autonomy*, 60 Tex. L. Rev. 175 (1982); *Braunfeld v. Brown*, 366 U.S. at 614. (Brennan, J., dissenting). Appellee Roy's right to spiritual freedom amid his daughter's need for physical health place him in a limited class of the disadvantaged because of Roy's minority religious belief and his inability to adequately support his family without assistance. 590 F. Supp. at 604-07. Laws which grant public benefits to such persons arguably, in a context of material need, should be judged by a lesser standard of review than that announced in *Lee*.

Lee appears to have revived *Braunfeld*'s rationale despite this Court's emphatic support in *Lee* of the principles announced in *Sherbert* and its progeny. 455 U.S. at 259.; *see* Smith, *supra*, at 188. Justice Stevens indirectly offered a theory for reconciling *Braunfeld* and *Lee* with the *Sherbert* precedent by virtue of the economic motivation present in *Braunfeld* and *Lee*. 455 U.S. at 263, n. 3. As discussed, however, Appellee Roy's claim is purely one of free exercise unadulterated by tax issues or the right to earn a livelihood. The analysis of *Braunfeld and Lee*, is inappropriate because it employs a hybrid standard that is triggered because of potentially severe and adverse economic consequences inherent in any exemption from the right to earn a livelihood and the payment or nonpayment of taxes.

The present case, therefore, requires the *Sherbert* and *Thomas* standard of review. Several facts are relevant to determine whether the Government's interest is sufficiently compelling. Like Sherbert, Appellee Roy's willingness to comply with the law as closely as permitted by his belief is a critical factor in the analysis. *See* Note, *supra*, at 312, n. 47. Willingness to adhere to the Government's requirement does not suggest defiance of governmental authority. To the contrary, it suggests merely a sharp conflict between a personal constitutional right and the desire to maintain personal freedom in a complex, modern society. 590 F. Supp. at 610.

Like Thomas, Appellee Roy's benefits were conditioned upon required conduct prohibited by religious beliefs. *Accord* Note, *supra*, at 327. In *Thomas*, this Court held this to be unconstitutional because of the Government's compulsion of behavior modification for otherwise entitled benefits. 450 U.S. at 717-18.

Perhaps, the most significant and glaring example of the Government's unfairness to Appellees is the denial of life supporting benefits to their daughter. Appellees' entitle-

ment to welfare arguably surpasses even the interests in *Sherbert* and *Thomas*. In these two cases, the appellants had entered a chosen realm of employment activity. Appellees have not chosen anything but to apply for welfare benefits. Sherbert's and Thomas' choices could be compared to Lee's choice of commercial activity, but Roy cannot be compared to Lee in any manner. Therefore, the injury to Roy is more aggravated in comparison to the injuries suffered in *Sherbert* and *Thomas*.

As a pure free exercise case, *Roy* requires the *Sherbert* and *Thomas* compelling interest-least restrictive means standard of review. *Lee* is *sui genesis* to issues involving payment or nonpayment of taxes.

CONCLUSION

We live in an age when Government assumes it has an all-pervasive authority to intervene in virtually all phases of life. While the Government obviously has, in some cases, valid reasons for their conduct, such is not true in the present case.

The issue, however, goes further than the intervention involved. It touches the very heart of religious freedom and the right of parents and children to be let alone within the confines of the institution of the family.

Appellees' fundamental rights are at stake. These rights should not be contravened merely to make the Government's job a bit more convenient.

This Court must, therefore, reject the Government's specious arguments for violating Appellees' constitutional guarantees and uphold the rights of Appellees to be free from the Government entanglement involved in the pre-

sent case. As such, it is essential that the decision below be affirmed.

Respectfully Submitted,

John W. Whitehead
Counsel of Record
James J. Knicely
D. Kevin Ikenberry
The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0100

Thomas O. Kotouc
The Rutherford Institute
of Alabama
Box 59561
Birmingham, Alabama 35259

Wendell R. Bird
William B. Hollberg
The Rutherford Institute
of Georgia
622 Candler Building
127 Peachtree St., N.E.
Atlanta, Georgia 30303

Tony Trimble
The Rutherford Institute
of Minnesota
316 East Main
Anoka, Minnesota 55305

J. Douglas Alexander
The Rutherford Institute
of Montana
104 Second Avenue, S.W.
Sidney, Montana 59270

Les Bailey
The Rutherford Institute
of Tennessee
710 East Sullivan Street
Kingsport, Tennessee 37660

W. Charles Bundren
The Rutherford Institute
of Texas
4300 Interfirst One
Dallas, Texas 75202

Guy O. Farley, Jr.
The Rutherford Institute
of Virginia
10521 Judicial Place
Fairfax, Virginia 22030

Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Appellants

v.

STEPHEN J. ROY, *et al.*,

Appellees

On Appeal from the United States District Court for the Middle District of Pennsylvania

BRIEF *AMICI CURIAE* OF NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN YOUTH COUNCIL, INC., WINNEBAGO TRIBE OF NEBRASKA, CONFEDERATED SALISH AND KOOTENAI TRIBES OF MONTANA AND KOOTENAI TRIBE OF IDAHO IN SUPPORT OF APPELLEES

STEVEN C. MOORE
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

S. JAMES ANAYA
NATIONAL INDIAN YOUTH COUNCIL, INC.
318 Elm Street, S.E.
Albuquerque, New Mexico 87102
(505) 247-2251

Counsel of Record for Amici Curiae

October, 1985

BEST AVAILABLE COPY

No. 84-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Appellants

v.

STEPHEN J. ROY, *et al.*,

Appellees

On Appeal from the United States District Court for the Middle District of Pennsylvania

BRIEF *AMICI CURIAE* OF NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN YOUTH COUNCIL, INC., WINNEBAGO TRIBE OF NEBRASKA, CONFEDERATED SALISH AND KOOTENAI TRIBES OF MONTANA AND KOOTENAI TRIBE OF IDAHO IN SUPPORT OF APPELLEES

STEVEN C. MOORE
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

S. JAMES ANAYA
NATIONAL INDIAN YOUTH COUNCIL, INC.
318 Elm Street, S.E.
Albuquerque, New Mexico 87102
(505) 247-2251

Counsel of Record for Amici Curiae

October, 1985

TABLE OF CONTENTS

Page

INTERESTS OF AMICI CURIAE.....3

SUMMARY OF ARGUMENT.....5

ARGUMENT.....9

I. THE GOVERNMENT'S POSITION IN THIS CASE SUBVERTS THE INTENT OF CONGRESS AS EXPRESSED IN THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT OF 1978 AND PREPETUATES THE HISTORY OF SUPPRESSION OF AMERICAN INDIAN RELIGION IN VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.....9

II. THE FEDERAL DEPARTMENTS OF AGRICULTURE AND HEALTH AND HUMAN SERVICES HAVE FAILED TO COMPLY WITH THE EXPRESS PROVISIONS OF SECTION 2 OF THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT WHEREIN CONGRESS INVITED RECOMMENDATIONS FOR LEGISLATION ACTION TO CHANGE EXISTING LAWS VIOLATIVE OF AMERICAN INDIAN RELIGION.....41

CONCLUSION.....50

TABLE OF AUTHORITIES

Cases	Page(s)
Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981)	4
Callahan v. Woods, 736 F.2d 1269 (9th Cir. 1984)	35
Engel v. Vitale, 370 U.S. 421 (1962)	38
Missouri, Kansas & Texas Railway Co. v. Roberts, 152 U.S. 114 (1894)	48
New Mexico Navajo Ranchers Association v. Interstate Commerce Commission, 702 F.2d 227 (D.C. Cir. 1983)	48
People v. Woody, 394 P.2d 813 (Calif. 1964)	39
Roy v. Cohen, 590 F.Supp. 600 (D.W.D. Penn. 1984)	11
Sequoyah v. T.V.A., 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980)	4
Sherbert v. Verner, 374 U.S. 398 (1963)	35, 37, 41
Thomas v. Review Board, 450 U.S. 707 (1981)	33, 36, 37, 41
United States v. Ballard, 322 U.S. 78 (1944)	32

Cases (Cont.) **Page(s)**

United States v. Sandoval, 231 U.S. 28 (1913).....31

United States v. Seeger, 380 U.S. 163 (1965).....33

Wallace v. Jaffree, 472 U.S. ___, 86 L.Ed.2d 29 (1985).....17, 32, 34

Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).....32

Wilson v. Block, 708 F.2d 735 (D.C. Cir.), cert. denied, ___ U.S. ____, 104 S.Ct. 371 (1983).....48

Wisconsin v. Yoder, 406 U.S. 205 (1972).....35, 36, 38, 41

Worcester v. State of Georgia, 31 U.S. (6 Pet.) 515 (1832).....24

Constitutional Provisions

U.S. Const. Amend. I.....Passim

Statutes and Treaties

American Indian Religious Freedom Act of 1978 (AIRFA), Public Law No. 95-341, 92 Stat. 469, 42 U.S.C. §1996.....Passim

General Allotment Act of 1887, Act of Feb. 8, 1887, 24 Stat. 388, 25 U.S.C. §§331 et seq.....28

Statutes and Treaties (Cont.) **Page(s)**

7 U.S.C. §2020(c).....49

42 U.S.C. §2000d.....49

1864 Treaty With The Chippewa of Saginaw, Swan Creek and Black River, in II Kappler, Laws and Treaties (Washington: Government Printing Office 1904).....27

Other Authorities

A Compilation of the Messages and Papers of the Presidents, Vol. III (J.D. Richardson, ed.).....27

Archdale, "A New Description of That Fertile and Pleasant Province of Carolina. . . (1707), from Carroll, B.R., Historical Collections of South Carolina, II (2 Vols. New York, 1836).....22, 23

Clark, Guidelines for the Free Exercise Clause, 83 Harv.L.Rev. 327 (1969).....36

Cohen, Felix S., The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy, 62 Yale L.J. 348 (1953).....12

Collier, John "United States Indian Administration As A Laboratory Of Ethnic Relations" Social Research 12:265-303 (1945).....26

Hanke, Lewis, Aristotle and the American Indians, (London, 1959)...22, 23

Other Authorities (Cont.) Page(s)

The History of Carolina (Charlotte, North Carolina, 1903).....20

Madison, J., "Memorial and Remonstrance Against Religious Assessments," 1785, from The Complete Madison (S. Padover ed. 1953).....32

Prucha, Frank, American Indian Policy Crisis (Norman: University of Oklahoma Press, 1976).....27

Report to the Commissioner of Indian Affairs (1892).....28

Schaeffer, Claude E., An Acculturation Study of the Indians of the Flathead Reservation in Western Montana, 1934-35 (Report to the Commissioner of Indian Affairs).....29

Story, J., Commentaries On The Constitution Of The United States, §1877 (1851).....19

Vogel,Virgil J., This Country Was Ours, (Harper & Rowe, New York 1972).....21

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No. 84-780

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, et al., Appellants,

v.

STEPHEN J. ROY, et al., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF AMICI CURIAE OF NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN YOUTH COUNCIL, INC., WINNEBAGO TRIBE OF NEBRASKA, CONFEDERATED SALISH AND KOOTENAI TRIBES OF MONTANA AND KOOTENAI TRIBE OF IDAHO IN SUPPORT OF APPELLEES

Pursuant to Rule 36.2, the National Congress of American Indians, a corporation having its principal office at 804 D Street, N.E., Washington, D.C.

20002; the National Indian Youth Council, Inc., a non-profit corporation with offices located at 318 Elm Street, S.E., Albuquerque, New Mexico 87102; the Winnebago Tribe of Nebraska, P.O. Box 681, Winnebago, Nebraska 68071; the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, Box 278, Pablo, Montana 59855; and the Kootenai Tribe of Idaho, P.O. Box 1269, Bonners Ferry, Idaho 83805; file the attached brief amici curiae in support of Appellees in the above-captioned case. Appellees have consented in writing to the filing of this brief, and a copy of their consent letter is appended hereto. Appellants, Secretaries Heckler and Block, through their counsel of record, have also consented to the filing of this brief by written letter mailed to amici's counsel on October 2, 1985; Appellant indicated

it would file a copy of said letter with the Court on October 3, 1985.

INTERESTS OF AMICI CURIAE

The National Congress of American Indians ("NCAI") was founded in 1944 and is the oldest and largest national organization of Indian governments and individuals in the United States, with a membership of federally recognized tribes representing a combined population of over 750,000 American Indians and Alaska Native people. NCAI and its membership have a profound concern with the ability of Indians and Indian tribes to protect their religious rights under the First Amendment. Such rights are critical to the survival of Indian tribes as distinct cultural entities.

The National Indian Youth Council, Inc. (NIYC) is a national, non-profit

Indian organization which was founded in Gallup, New Mexico in 1961. Since that time NIYC has engaged in a number of organizing activities and legal challenges which have attempted to preserve and enrich traditional Indian communities and protect Indian traditions on and off the reservation. Toward that end NIYC has been extensively involved in litigation which has sought to insure the survival of American Indian religions, including Sequoyah v. T.V.A., 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980) and Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981).

The Winnebago Tribe of Nebraska, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana and the Kootenai Tribe of Idaho are federally recognized tribes of more than 6,000

members. The Tribes are participating as amici because many of their members maintain their traditional Indian religious beliefs and practices. They share deep concern for all Indian peoples whose religious freedoms are threatened by government action.

SUMMARY OF ARGUMENT

The fundamental purpose of the religion clauses of the First Amendment is to protect and nurture the freedom of conscience of individuals in our pluralistic society. But when counter-balanced against the purpose of federal laws such as the Social Security Act individual religious beliefs may appear to pale in importance. Thus to protect these beliefs the decisions of this Court have demanded that the means adopted by government to achieve compelling purposes be the "least restrictive" available.

On a broad scale the interests which the Government purportedly seeks to protect in this case - namely, the prevention of fraud and the enhancement of efficiency in administering Social Security Act programs - are important. But the Government cannot demonstrate that the means chosen, requiring Social Security numbers of all applicants and their dependents, without exception, is the least restrictive of Mr. Roy's sincerely held religious beliefs. Mere speculation that creating an exception for Mr. Roy's daughter, Little Bird of the Snow, would lead to the potential for widespread abuse of and massive increase in administrative cost to the programs involved does not, standing alone, justify infringement. Labeling these interests "programmatic governmental interests" does not change that result.

Amici are particularly concerned about this case because the religious beliefs involved are those of a Native American. Mr. Roy's beliefs are surely not entitled to greater protection than the religious beliefs of any other individual or group. But Congress, through the American Indian Religious Freedom Act of 1978, 42 U.S.C. §1996, has expressly acknowledged the commitment of the United States to respecting the religious beliefs of Native Americans; recognizing that because of a lack of sensitivity and understanding federal laws have oftentimes violated such beliefs. As a statement of federal law and policy AIRFA embodies the fundamental principle of the First Amendment that exceptions to government-sponsored activities or regulations must be made when sincerely held religious beliefs are

infringed thereby. To subordinate the religious beliefs of individual Native Americans to programmatic governmental interests, as the Government would advocate here, violates the express dictates of AIRFA and the First Amendment to the Constitution.

Moreover, the federal departments in this case have failed to fully comply with Section 2 of AIRFA, 92 Stat. 470, which mandated that they conduct an internal assessment of whether their regulations, policies and practices are violative of AIRFA and the First Amendment rights of Indian people. It is conceivable that this case could have been avoided if the requirements of Section 2 had been met. The remedy for a Section 2 violation in the context of

this case is not clear[1]; at a minimum, however, it is evidence of federal administrative intrasigence which cannot be allowed to persist.

ARGUMENT

I. THE GOVERNMENT'S POSITION IN THIS CASE SUBVERTS THE INTENT OF CONGRESS AS EXPRESSED IN THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT OF 1978 AND PREPETUATES THE HISTORY OF SUPPRESSION OF AMERICAN INDIAN RELIGION IN VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

At stake in this case are the religious beliefs of one Native American, Mr. Stephen Roy, and his right to maintain those beliefs, against the alleged interests of the federal government in preventing fraud and abuse in its public assistance programs. The Government asserts, without any credible evidence, that making one exception in

---

[1] See Discussion in Section II, infra.

this case, to the requirement that all applicants provide Social Security numbers ("SSN") as a precondition to receiving welfare benefits, will invite fraud and abuse upon the entire system. It thus argues that the Court must balance what it labels its "programmatic governmental interests" against Mr. Roy's sincere religious beliefs.

As Indian tribes and national Indian organizations, amici are vitally concerned with the protection of the First Amendment rights of Native Americans, and with challenging federal or state laws, regulations, policies and practices which may infringe upon those rights. To that end amici consider this an important case: irrespective of whether Mr. Roy's beliefs concerning the SSN requirement are shared by all Indian people, they are religious in nature,

sincerely held, and are thus entitled to constitutional protection to the same degree as are non-Indian religious beliefs. Moreover, as a general proposition the decision in this case will have broad implications for the manner in which federal departments and agencies view and treat Indian religions and the corresponding ability of Indian people to practice their traditional religions.

The Government in the district court action challenged Mr. Roy's beliefs as irrational, not religious, and therefore not deserving of First Amendment protection. Roy v. Cohen, 590 F.Supp. 600, 609 (D.W.D. Penn. 1984). The district court found otherwise. Id. The Government has not challenged these findings on appeal; nonetheless, clear from a reading of its brief is the

impression the Government has little patience with what it considers to be Mr. Roy's highly unorthodox religious beliefs. Intolerance of this nature toward Indian religion cannot be allowed to pervade the federal administrative bureaucracy.[2/]

[2/] Troubling enough is the message the Government's position in this case sends to practitioners of traditional Indian religions. The Government, through its appeal, is sending an equally cryptic message to persons of all religions that are not dominant in this country. For, as Felix S. Cohen, the preeminent scholar in the field of federal Indian law, once noted:

> Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith. . . .

Cohen, The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy, 62 Yale L.J. 348 (1953).

Congress sought to put an end to the federal intolerance of Native American religion of the kind espoused in this case through the American Indian Religious Freedom Act of 1978 (AIRFA), Public Law 95-341, 92 Stat. 469, 42 U.S.C. §1996. Enacted as a "Joint Resolution on American Indian Religious Freedom", AIRFA set forth the unequivocal policy of the United States to "protect and preserve for American Indians their inherent freedom to believe, express and exercise. . . traditional religions." Congress made certain findings regarding Indian religion, contained in AIRFA's preamble, among which include:

> Whereas the United States has traditionally rejected the concept of a government denying individuals the right to practice their religion and, as a result, has benefitted from a rich variety of religious heritages in this country;

• • •

> Whereas the lack of a clear, comprehensive, and consistent federal policy has often resulted in the abridgement of religious freedom for traditional American Indians;
>
> • • •
>
> Whereas such religious infringements result from the lack of knowledge of or the insensitive and inflexible enforcement of Federal policy and regulations premised on a variety of laws. . . passed without consideration of their effect on traditional American Indian religions.

92 Stat. 469.

These findings are significant. For the first time in the United States' history Congress has expressly acknowledged, as a matter of law and policy, its affirmative obligation to protect Indian religious beliefs. Explicit in the findings quoted above is the admission that federal laws, regulations and policies - both

intentionally and unintentionally - historically have infringed upon the First Amendment rights of American Indians.

The position advocated by the Government in this case, regrettably, perpetuates the very attitude of insensitivity and hostility which Congress sought to stem by the passage of AIRFA, little more than seven years ago. Native Americans represent a small minority group in the United States today, with numbers close to 1.4 million people. Oftentimes their religious beliefs and practices are considered unorthodox, especially by members of Christian religious groups. Yet for these very reasons Congress in AIRFA directed federal agencies to assess their regulations, policies and practices to determine whe.e they must

yield to protect Indian religious beliefs. Section 2 of AIRFA, 42 Stat. 470. (See discussion, infra.) The case presently before the Court demonstrates the continued intransigence of the federal bureaucracy to yield despite express congressional admonition to the contrary. If the Government's position is allowed to prevail the best intentions of Congress to protect our "rich variety of religious heritages" will have little meaning.

Some of the most eloquent pronouncements of the Supreme Court have been made concerning the sanctity of religious freedom in our country. Just last Term the Court, in an opinion by Justice Stevens, paid homage to the importance of the First Amendment:

> [The First Amendment] forestalls compulsion by law of the acceptance of any creed or the practice of any form of

> worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law.
>
> • • •
>
> Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of this right to refrain from accepting the creed established by the majority. Wallace v. Jaffree, 472 U.S. ____, 86 L.Ed.2d 29, 39-40 (1985).

At the same time, however the Court noted the historical limitations of the Amendment's intent:

> At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism [footnote omitted]. Id. at 40-14.

Yet the Court made clear that times and circumstances had changed; that the Constitution and the Bill of Rights, if truly organic and dynamic, must meet the needs of an ever-increasingly complex society.

> But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all [footnote omitted].

Id. at 41.

But Native Americans, perhaps more than any minority racial group in this country, have sufficient reason to be skeptical of whether the First Amendment as a protectorate of their rights will withstand the challenge when seriously put to the test. It is for this reason that amici take such great interest in

the case at bar. The extremism of the government's position in this case has put religion, specifically the religious beliefs of one Indian, on trial. Certainly Congress, through AIRFA, did not intend such a result; this Court should not sanction it.

Amici would generally agree with Justice Stevens that the prevailing public sentiment from the 16th through the 19th centuries did not tolerate "equal respect" for the notion of "freedom of conscience" for non-Christians, including Native Americans.[3/] Indeed, absolute

---

[3/] As Joseph Story noted: "The real object of the [First] amendment was not to countenance, much less to advance, Mohammedism, or Judaism, or infidelity, by prostrating christianity; but to exclude all rivalry among christian sects, and to prevent any national ecclesiastical establishment, . . ." 2 J. Story, Commentaries On The Constitution Of The United States, §1877, p. 594 (1851).

indigation and intolerance regarding Indian religion marks the pre-Constitutional era in federal-Indian relations. Indian people were treated as heathens and savages[4]; entire communities of Indian people were systematically murdered and villages destroyed by the first Pilgrims, with "God's" blessing. William Bradford was to remark, concerning the burning of a Pequot Village by the non-Indian people of Massachusetts, in his History of Plymouth Plantation:

4/John Lawson, a colonist leader from Carolina, is quoted as saying: "We look upon them [Carolina Indians] with Scorn and Disdain and think them little better than Beasts in Human Shape." The History of Carolina (Charlotte, North Carolina, 1903) p. 141.]

> Those that scaped the fire were slaine with sword; some hewed to peeces, others rune throw with their rapiers, so as they were quickly dispatch, and very few escaped. It was conceived they thus destroyed about 400, at this time. It was a fearful sight to see them thus frying in the fryer, and the streams of blood quenching the same, and horrible was the stinck and sente there of; but the victory seemed a sweete sacrifice, and they gave the prayers thereof to God, who had wrought so wonderfully for them, thus to enclose their enemise in their hands, and give them so speedy a victory over so proud and insulting an enimie. Virgil J. Vogel, This Country Was Ours, p. 42 (Harper & Rowe, New York 1972).

And as a general proposition it was believed by religious leaders that God had sanctioned the ruthless extermination of Indian populations, either by murder or by disease brought to the New World by explorers and immigrants:

> The prominent Quaker John Archdale included in his

> report on the disappearance of Indians in the Carolinas the statement that Providence has reserved the extermination of the Indians for the "Spanish Nation, and not for the English, who in their Natures are not so cruel." More "the Hand of God was eminently seen in thinning the Indians, to make room for the English. . . it at other times pleased Almightly God to send unusual Sicknesses amongst them, as the Smallpox, to lessen their Numbers; so that the English, in Comparison to the Spaniard, have but little Indian Blood to answer for." Archdale did not wholly excuse the English in their treatment of the Indians, but he did conclude that for the killing of Indians "it pleases God to send. . . an Assyrian Angel to do it himself" and pointed out a final "Example of God's more immediate Hand, in making a Consumption upon some Indian nations in North Carolina." (Emphasis in original.)

Hanke, Lewis, Aristotle and the American Indians, (London, 1959), p. 100, quoting Archdale, "A New Description of That Fertile and Pleasant Province of Carolina. . . (1707)," in Carroll, B.R.,

Historical Collections of South Carolina, II (2 Vols. New York, 1836), 88-89.[5]

Even while the earliest cases of the Supreme Court addressing the legal status of Indian nations considered them to be "distinct, independent political communities" where the laws of the

---

[5] The Spanish, uncertain about the theological status of the Natives in the New World, and to make certain that conquests proceeded according to Christian principles, adopted the famous "Requirement," which had to be read formally to the Indians they encountered before any hostilities could commence. The Requiremento began with a brief history of the world since its creation, continued with an account of the establishment of the Papacy and described the donation by Pope Alexander IV of the lands then occupied by the Indians to the kings of Spain. The Indians, after hearing these sacred words, were supposed to acknowledge the lordship of the kings of Spain and to allow the Christian faith to be preached to them. Failure to surrender to the Spanish by the Indian justified whatever cruelties then followed and made the ensuing war theologically proper. Hanke, Lewis, Aristotle and the American Indians, at pp. 15-16.

states had no force and effect, Worcester v. State of Georgia, 31 U.S. (6 Pet.) 515, 559 (1832), as a practical matter little thought was given to respecting the religious and cultural integrity of Indian people. Samuel Worcester, the plaintiff in Worcester, was a missionary of the American Board of Commissioners of Foreign Missions, who resided in the Cherokee Nation under the authority of the President of the United States. Id. at 528-29.

Despite the profound influence these early decisions of the Court had upon the establishment and development of federal Indian law, the other branches of the federal government - the Executive and the Legislative - paid little heed to their fundamental teachings. John Collier, Commissioner of Indian Affairs From 1933 through 1945, noted:

Chief Justice John Marshall's opinions are the foundation of the Indian law of the United States and of that policy which became official when Congress passed the Indian Reorganization Act of 1934.

• • •

Basically, they assert that the Indian societies exist by inherent right and by pledge and policy of the United States; that only those powers expressly taken away by act of Congress are surrendered by any Indian tribe; that the course of events has caused these Indian sovereignties to become dependent on the national government of the United states for protection, advice and aid. But there is a sad corollary to this position, and it was acknowledged by John Marshall: these dependent sovereignties are dependent on the political, and hence also on the executive, arm of the national government. President Jackson remarked, "John Marshall made the Indian law, let him enforce it." Marshall foreknew the horrors which were to come.

• • •

The Supreme Court never consistently departed from Marshall's position. Congress

> and the Executive, however, swung just as far from him as it was humanly possible to go. It was more than a century before Marshall prevailed in fact. For hundreds of the Indian societies this was too late. Hundreds of streams of tradition, of institutional systems potent and splendid, of noble and flavorous personality types, were wiped from the book of life in that century after John Marshall. (Emphasis added.)

Collier, "United States Indian Administration As A Laboratory Of Ethnic Relations," Social Research 12:265-303, 268-69 (1945).

Numerous federal laws enacted by Congress, and implemented by administrative agencies through regulations and policies, have devastated Indian religion and culture. These laws and policies have led to the conspiracy of government agents and religious missionaries to convert Indians to Christianity to hasten the

process of civilisation[6]; the removal of entire tribal communities to distant reservations away from sacred lands and traditional hunting and fishing grounds[7]; the granting of express tracts of land on Indian reservations by treaty or executive order to Christian missionary societies[8]; the General Allotment Act of 1887 and the resulting breakup of traditional communal land ownership as

---

[6]See, generally, Prucha, Frank, American Indian Policy Crisis (Norman: University of Oklahoma Press, 1976).

[7]See, remarks of President Andrew Jackson in A Compilation of the Messages and Papers of the Presidents, Vol. III (J.D. Richardson, ed.), p. 519.

[8]See, e.g., Article 4 of the 1864 Treaty With the Chippewa of Saginaw, Swan Creek, and Black River, in II Kappler, Laws and Treaties (Washington: Government Printing Office, 1904), pp. 868, 870.

an instrument of the policy of assimilation;[9] the suppression of religious ceremonies and rituals such as the Sun Dance and Ghost Dance[10]; and

---

[9]Act of Feb. 8, 1887; 24 Stat. 388, 25 U.S.C. §§331 et seq.; Collier, supra, at 272.

[10]In 1892, Commissioner of Indian Affairs Thomas Morgan revised the Federal regulations governing the operation of tribal courts to prohibit Indian dancing:

> Dances, etc. - Any Indian who shall engage in the sun dance, scalp dance, or war dance, or any other similar feast. . . shall be deemed guilty of an offense, and upon conviction thereof shall be punished for the first offense by the withholding of his rations for not exceeding ten days; and for any subsequent offense under this clause he shall be punished by withholding his ration for not less than ten nor more than thirty days, or by imprisonment for not less than ten nor more than thirty days.

Report of the Commissioner of Indian Affairs (1892) p. 29.

the forced burning of medicine bundles and forced attendance of Indian children at Christian missionary boarding schools, often times at great distances from Indian reservations.11/

The Judicial Branch, while less active historically in the extinguishment of Indian culture and the persecution of religious beliefs, nonetheless has displayed extreme insensitivity toward these values. The Supreme Court, for example, in a case involving a conflict over land between a railroad and the Osage Tribe, remarked:

> Though the law as stated with reference to the power of the government to determine the right of occupancy of the Indians to their lands has always been recognized, it is

---

11/ See, generally, Schaeffer, Claude E., An Acculturation Study of the Indians of the Flathead Reservation in Western Montana, 1934-) (Report to the Commissioner of Indian Affairs).

> to be presumed, as stated by this Court in the Rutte case, that in its exercise the United States will be governed by such considerations of justice as will control a Christian people in their treatment of an ignorant and dependent race. . . . (Emphasis added.) Missouri, Kansas & Texas Railway Co. v. Roberts, 152 U.S. 114, 116 (1894).

And in a 1913 decision of the Supreme Court relating to the introduction of liquor onto the Santa Clara Pueblo in New Mexico, Justice Van Devanter quoted with approval a 1906 report of the local Indian superintendent:

> Santa Fe, 1905: "Until the old customs and Indian practices are broken among this people we cannot hope for a great amount of progress. The secret dance, from which all whites are excluded, is perhaps one of the greatest evils. What goes on at this time I will not attempt to say, but I firmly believe that it is little less than a ritual system of debauchery. The Catholic clergy is unable to put a stop to this evil, and know as little of same as others. The United States mails are not permitted to pass through the streets of

> the Pueblos when one of these dances is in session; travelers are met on the outskirts of the Pueblo and escorted at a safe distance around. The time must come when the Pueblos must give up these old pagan customs and become citizens in fact." (Emphasis added.) United States v. Sandoval, 231 U.S. 28, 42 (1913).

Implicit in the characterization of the "secret dance" as an "old pagan custom" is the notion that Indian religious beliefs and practices - predating the advent of Christianity - were not to be tolerated or protected in the constitutional sense as other Judeo-Christian religions.

This legacy of denigration of Indian religion contrasts sharply with the Court's traditional standard for the treatment of unorthodox religious beliefs. Since the early writings of

Madison,[12] Story and others the Court has held steadfast to the notion that individual freedom of conscience and sincere religious belief, irrespective of its eccentricity, is an unalienable right. See, e.g., Watson v. Jones, 80 U.S. (13 Wall.) 679, 782 (1871) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."); United States v. Ballard, 322 U.S. 78, 86 (1944) ("Freedom of thought, which

---

[12]/James Madison, writing in 1785, considered it a "fundamental and undeniable truth" that the "religion of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right." J. Madison, "Memorial and Remonstrance Against Religious Assessments, 1785", from The Complete Madison 299-301 (S. Padover ed. 1953), quoted in Wallace v. Jaffree, supra, 86 L.Ed.2d at 41 n. 38.

includes freedom of religious belief, . . . embraces the right to maintain theories of life and death and of the hereafter which are rank heresy to followers of the orthodox faiths."); United States v. Seeger, 380 U.S. 163, 184 (1965) ("Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's "supreme being" or the truth of his concepts. But these are inquiries foreclosed to government."); Thomas v. Review Board, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent or comprehensive to others in order to merit First Amendment protection.")

Until this case the Court has never been directly confronted with an opportunity to consider the constitutionality of a federal statute

which conditions the receipt of a benefit on the willingness of a Native American to compromise his religious beliefs. As stated earlier, AIRFA, and the express findings made by Congress therein, puts to the test the Court's unswerving commitment, reaffirmed most recently in Jaffree, to the protection of First Amendment rights, regardless of the nature of the religion at issue.

Native Americans represent a comparatively small group in this country, whose traditional religious beliefs some would consider extremely unorthodox. Thus, the potential to subordinate their interests to the force of the federal bureaucracies involved in this case is great. The First Amendment, however, prohibits governmental actions that burden an individual's free exercise unless those

actions are necessary to fulfill a governmental interest of the "highest order" that cannot be met in a less restrictive manner. Wisconsin v. Yoder, 406 U.S. 205, 214-215 (1972); Sherbert v. Verner, 374 U.S. 398, 403-09 (1963). For this reason the "least restrictive means inquiry" is considered to be the "critical aspect" of the free exercise analysis. Callahan v. Woods, 736 F.2d 1269 (9th Cir. 1984).

> If a law is found to be reasonable, then the question of its importance is raised. The importance of a law should be measured not by all the benefits it confers on society, but by the incremental benefit of applying it to those with religious scruples. Its importance, in other words, should be the cost of resorting to a nonrestrictive or less restrictive alternative by exempting from the law's coverage those conscientiously opposed to the law. Regulating conduct in some way other than the legislature has chosen usually

> involves some degree of cost, at least potentially, to the efficiency of any regulatory scheme.

Clark, Guidelines for the Free Exercise Clause, 83 Harv.L.Rev. 327, 331 (1969).

The Government here would have the Court abandon the traditional application of the least restrictive means inquiry, foresaking the case-by-case determination in favor of a "programmatic governmental interest" analysis (Brief for the Appellants, p. 29), because it could not, as factual matter, meet the traditional free exercise standard. However, the speculation of widespread fraud and abuse, if this one exception is made, is too specious, too speculative to be accorded any weight. See, Thomas v. Review Board, supra, 450 U.S. at 719; Wisconsin v. Yoder, supra, 406 U.S. at 224-25 (1972).

The adoption of a "programmatic governmental interest" approach, where the cost of "adopting a less burdensome alternative applicable to the populace as a whole" is considered (Br. at p. 29), is wrong for other reasons. It runs contrary to an unambigious line of precedent by this Court. Sherbert v. Verner, supra; Thomas v. Review Board, supra.

Further, and perhaps most importantly for amici, the religious beliefs of individual Indians like Mr. Roy and others - in addition to those of non-dominant religions, long considered sacrosanct by this Court - will be stripped of constitutional protection. Thus as a matter of constitutional necessity a case-by-case analysis must be used to determine whether the effect of government activity is the least restrictive upon religious beliefs.

The risk of adopting the Government's approach has clearly been recognized by this Court before:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. Engel v. Vitale, 370 U.S. 421, 431 (1962).

More recently the Court stated:

> Nor is the impact of the [governmental action] confined to grave interference with important. . . religious tenets from a subjective point to view. It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, [the government action] carries with it a very real threat of undermining the . . . community and religious practices as they exist today; they must either abandon belief . . . or be forced to migrate to some other and more tolerant region. Wisconsin v. Yoder, supra, 406 U.S. at 218.

And never stated so eloquently in the context of Native American religious beliefs than by the California Supreme Court in the case of People v. Woody, 394 P.2d 813 (Calif. 1964):

> We know that some will urge that it is more important to subserve the rigorous enforcement of the narcotic laws than to carve out of them an exception for a few believers in a strange faith. They will say that the exception may produce problems of enforcement and that the dictate of the state must overcome the beliefs of a minority of Indians. But the problems of enforcement here do not inherently differ from those of other situations which call for the detection of fraud. On the other hand, the right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve

> a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan near Needles, California.

Id. at 821-22.

Perhaps the most illuminating statement of the Government's position in this case is found at page 42 of its brief:

> There is something fundamentally wrong with the notion that an individual can claim an entitlement to governmental benefits while at the same time refusing to comply with that portion of the program designed to verify eligibility and detect fraud most effectively. (Emphasis added.)

The implication of that statement for Mr. Roy and others similarly situated is clear: otherwise eligible individuals who hold sincere, albeit unorthodox, religious beliefs must be prepared to prostrate those beliefs to receive

public assistance benefits. Would the Government have Mr. Roy survive on religious beliefs alone, to satisfy a wholly unproven need to protect the security and efficiency of the federal benefit programs involved? Amici submit that there is "something fundamentally wrong" with the Government's logic. The decisions of this Court have never allowed such a result. Yoder, supra; Sherbert, supra; Thomas, supra; certainly Congress, through AIRFA, sought to preclude such a result.

II. THE FEDERAL DEPARTMENTS OF AGRICULTURE AND HEALTH AND HUMAN SERVICES HAVE FAILED TO COMPLY WITH THE EXPRESS PROVISIONS OF SECTION 2 OF THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT WHEREIN CONGRESS INVITED RECOMMENDATIONS FOR LEGISLATION ACTION TO CHANGE EXISTING LAWS VIOLATIVE OF AMERICAN INDIAN RELIGION

The Government in brief seeks to impress upon the Court the importance of

preventing fraud and abuse with its public assistance programs, and the corresponding difficulty and cost associated with accomodating Mr. Roy's religious beliefs. It should not now be heard to complain, inasmuch as such an examination was expressly required in 1978 by the American Indian Religious Freedom Act. Section 2 of AIRFA contained the following mandate to federal departments and agencies:

> Sec. 2 The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to Congress the results of his evaluation, including any changes which were made in administrative

policies and procedures, and any recommendations he may have for legislative action. (Emphasis added.) 92 Stat. 470.

Pursuant to Section 2, the President directed the Secretary of the Department of the Interior to establish an interdepartmental Task Force to prepare the report to Congress. Within one year of the date of AIRFA's enactment, the Task Force published its report, entitled the AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT, P.L. 95-341: Federal Agencies Task Force (August 1979) ("AIRFA Task Force Report").[11/] The AIRFA Task Force conducted a number of public meetings nationwide for the purpose of consulting with religious leaders; however, their

---

11/For the Court's and parties' convenience, Amici have lodged a copy of the AIRFA Task Force Report with the Court.

efforts did not supplant the obligation of each department and agency to hold independent consultations.[14/]

Representatives from the Department of Agriculture and Health, Education and Welfare (now Health and Human Services), which are responsible for administering the Food Stamp and Aid to Families with Dependent Children programs, participated in the Task Force from its inception. See, AIRFA Task Force Report, p. 24. And both Departments, to varying degrees, initiated internal reviews of their respective regulations and policies, as mandated by Section 2, to search for possible AIRFA violations. But neither fully complied

---

14/ See AIRFA Task Force Report, Appendix C, for evidence of consultation by the U.S. Fish and Wildlife Service, the National Park Service, the U.S. Customs Service, the U.S. Navy, etc.

with the Act.

By undated letter, Secretary of Agriculture Bergland wrote to James Abourezk, Chairman of the Senate Select Committee on Indian Affairs, indicating the establishment within his Department of a "Native American Task Force. . . to improve the effectiveness of USDA's programs as they apply to Native Americans." The Task Force was composed of "four. . . assistant secretaries and supporting agency staff people as required." See Bergland letter to Abourezk, AIRFA Task Force Report, Appendix A.

However, there is no evidence in the Task Force Report - which contains copies of all official agency correspondence relating to compliance with Section 2 of AIRFA - that Agriculture's Native American Task Force ever met, discussed possible problems

under the Food Stamp Program, sought consultation with Native American religious leaders concerning that program, or submitted a final report to the AIRFA Task Force.[13/]

Similarly, Secretary Califano of the Department of Health, Education and Welfare, by letter dated May 31, 1979, transmitted to Secretary Andrus of Interior a copy of a report summarizing the internal review conducted by various HEW agencies. The report of the Social Security Administration's review stated as follows:

[13/]The only correspondence from an agency within the Department is a May 10, 1979 letter from the Forest Service to the Interior Department, relating to certain forest management and planning practices which may raise Indian religion concerns. See AIRFA Task Force Report, Appendix B. (See also, Forest Service Summary Statement, AIRFA Task Force Report, pp. 24-1)

> The self-assessment conducted by the Social Security Administration did not reveal any policies or procedures which need to be addressed. However, the agency is willing to continue its review if Native American religious leaders wish to provide specific examples of areas which should be examined. AIRFA Task Force Report, Appendix B.

Like the Department of Agriculture, the Social Security Administration never conducted a comprehensive self-assessment of all its programs. There was no explanation of whether the AFDC program regulations, etc. were examined, nor was there any effort made to consult American Indian religious leaders, in direct contravention of Section 2.

Had there been full compliance with Section 2, especially consultation with Indian religious leaders, it is conceivable that religious objections similar to Mr. Roy's concerning the

Social Security number requirement would have been raised and a recommendation for administrative or legislative action made in the AIRFA Task Force Report. Lower federal appellate courts have unanimously held that AIRFA imposes a procedural requirement on federal departments and agencies to fully consider the impact of administrative activities upon traditional Indian religious beliefs and practices. Failure to do so has been held to be a violation of AIRFA, and the basis for remand to an agency to fulfill its AIRFA duties. See, New Mexico Navajo Ranchers Association v. Interstate Commerce Commission, 702 F.2d 227 (D.C. Cir. 1983); Wilson v. Block, 708 F.2d 735 (D.C. Cir.), cert. denied, ___ U.S. ____, 104 S.Ct. 371 (1983).

A remand in this case, however, is

unnecessary. The Court has been asked to consider the constitutionality of two federal statutes requiring SSN's as a precondition to receiving public assistance benefits. If the district court decision is affirmed, it will be necessary for Congress to consider amending the statutes to cure the defect. Congress has already indicated a receptivity to curing such a defect, both through AIRFA and the requirement that these programs not discriminate in the distribution of benefits on the basis of race or religion. See 42 U.S.C. §2000d; 7 U.S.C. §2020(c). Likewise, the federal departments administering the statutes will have to amend their regulations and operating procedures accordingly. This should be done in consultation with Indian religious leaders. In this way

compliance with AIRFA, albeit late, will be effectuated.[16/]

III. CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the district court.

Respectfully submitted,

STEVEN C. MOORE
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

S. JAMES ANAYA
NATIONAL INDIAN YOUTH COUNCIL, INC.
318 Elm Street, S.E.
Albuquerque, New Mexico 87102
(505) 247-2251

Counsel of Record for Amici Curiae

OCTOBER, 1985

16/A remand to the district court with instructions to order compliance with AIRFA by these federal departments will be necessary, however, if the Court upholds the challenged statutes as constitutional.

McKEES, WALLACE & NURICK
ATTORNEYS AT LAW

RECEIVED
SEP 09

September 4, 1985

Steve Moore, Esquire
Native American Rights Fund
1506 Broadway
Boulder, CO 80302

Re: Mackler v. Bay
Supreme Court of the United States
October Term 1984 (No. 84-7901)

Dear Steve:

It occurred to me that, although your organization intends to file an amicus brief on behalf of appellees, you had not requested our written consent as required by Supreme Court Rule 36.2. Therefore, I am enclosing our written consent which you may file with the brief as required by Rule 36.2.

Again, thank you for your consideration and assistance.

Very truly yours,

McKEES, WALLACE & NURICK

By Franklin A. Miles, Jr.

FAM/vmw

Enclosure

cc: Gary S. Gildin, Esquire

No. 84-780

Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

Margaret M. Heckler, Secretary of Health and Human Services, *et al.*,

Appellants,

v.

Stephen J. Roy, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

---

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLEES

Steven Frederick McDowell
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

Counsel of Record for Amicus Curiae

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
INTRODUCTION	3
I. AS A PRACTICAL MATTER, THIS COURT'S BROAD CONSTRUCTION OF THE ESTABLISHMENT CLAUSE HAS NOT ASSISTED AND HAS ACTUALLY IMPEDED PROTECTION OF RELIGIOUS INDIVIDUALS' EXERCISE OF THEIR RIGHTS OF CONSCIENCE	3
II. IN LIGHT OF THE PRACTICAL RESULTS ARISING FROM THIS COURT'S ESTABLISHMENT CLAUSE PRECEDENT, VIGOROUS JUDICIAL ENFORCEMENT OF THE FREE EXERCISE CLAUSE IS NECESSARY FOR THE PROTECTION OF RELIGIOUS INDIVIDUALS' EXERCISE OF THEIR RIGHTS OF CONSCIENCE	7
CONCLUSION	11

TABLE OF AUTHORITIES

Cases — Page

Aguilar v. Felton, 105 S. Ct. 3232, 3237 (1985) 4, 6

Engel v. Vitale, 370 U.S. 421, 430 (1962) 5, 9

Estate of Thornton v. Caldor, Inc., 105 S. Ct. 2914 (1985) 6, 8

Everson v. Board of Education, 330 U.S. 1 (1947) 5

Grand Rapids School District v. Ball, 105 S. Ct. 3216, 3222 (1985) 4, 6

Sherbert v. Verner, 374 U.S. 398 (1963) 7, 9

Thomas v. Review Board, 450 U.S. 707, 720-727 (1981) 3, 7, 8

U.S. v. Lee, 455 U.S. 252, 256-261 (1982) 10

Wallace v. Jaffree, 105 S. Ct. 2479, 2487 (1985) 3, 4, 6

Wisconsin v. Yoder, 406 U.S. 205 (1972) 7

Zorach v. Clauson, 343 U.S. 306, 313, 96 L. Ed. 954, 72 S. Ct. 679 (1952) 4

No. 84-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Appellants,

v.

STEPHEN J. ROY, *et al.*,

Appellees.

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League) is a non-profit voluntary association, national in membership, organized to promote good will and harmonious relations in the community, to combat all forms of religious prejudice and discrimination and to defend the right to life of all, born and pre-born. To fulfill these purposes the League frequently files amicus curiae briefs in cases, such as this one, involving the free exercise of religion. The League's objective is to further each person's right to freely exercise their religious beliefs.

The League has obtained written permission to file this brief from the counsels of record for the parties in this case. These letters have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

The individual's freedom of conscience is the central liberty that unifies the various Clauses in the First Amendment. *Wallace v. Jaffree*, 105 S. Ct. 2479, 2487 (1985). This policy could perhaps be served best by a limited interpretation of both the Free Exercise and Establishment Clauses. However, because this Court has broadly construed the Establishment Clause, protection of religious conscience requires a similarly broad construction of the Free Exercise Clause.

The Court's expansive construction of the Establishment Clause has not assisted and has actually impeded protection of religious individuals' exercise of their rights of conscience. Although preservation of rights of conscience is the predominant policy underlying the Establishment Clause, the Court has not used this interest to regulate its application of that clause. This has resulted in Establishment Clause precedent which has had a negative, rather than positive effect upon religiously-oriented individuals' exercise of rights of conscience. This problem has been aggravated by the popular perception that this Court's application of the Establishment Clause precludes meaningful legislative accommodation of religiously-oriented individuals' rights of conscience.

In light of the practical difficulties this Court's Establishment Clause precedent has imposed upon religiously-oriented individuals' exercise of their rights of conscience, vigorous judicial enforcement of the Free Exercise Clause is necessary for the protection of religious individuals' exercise of these rights. The Court's relatively expansive application of the Free Exercise Clause has proven very suitable to this purpose. Features of this Court's Free Exercise Clause interpretation which help to protect religious individuals' exercise of their rights of conscience are the direction of Free Exercise Clause precedent to the prevention of governmental coercion on religious exercise, the insulation of protection of religious conscience under the Free Exercise Clause from the rigorous Establishment Clause scrutiny which often attends legislative protection of these rights and the presence of Free Exercise Clause protection irrespective of the lack of

legislative action on behalf of the involved religious group. This Court's Free Exercise Clause precedent also results in flexible, individually-oriented accommodation of religious exercise with legitimate governmental needs. Such an individually-oriented approach should be continued in this case. Unlike Free Speech cases in which an "accommodation" might require a forum to be open to a wide variety of speakers, a finding of "accommodation" under the Free Exercise Clause does not normally involve "accommodations" for persons other than those with specific religious objections to a governmental requirement. Further, this individually-oriented approach properly permits consideration of the number of individuals seeking an accommodation in determining whether there exists a compelling governmental interest sufficient to outweigh the proposed accommodation.

ARGUMENT

INTRODUCTION

This case gives this Court the opportunity to again consider the scope of protection the Free Exercise Clause affords individuals. Justice Rehnquist's dissent in *Thomas v. Review Board*, 450 U.S. 707, 720-727 (1981) criticized the expansive scope of protection afforded under this clause. However, amicus submits that the expansive interpretation this Court has given the Establishment Clause requires a correspondingly expansive interpretation for the Free Exercise Clause. A more limited interpretation of both clauses might best serve governmental interests and religious liberty interests. However, if the Establishment Clause is afforded a broad construction, satisfactory protection of religious liberty requires an equally broad construction of the Free Exercise Clause.

I.

AS A PRACTICAL MATTER, THIS COURT'S BROAD CONSTRUCTION OF THE ESTABLISHMENT CLAUSE HAS NOT ASSISTED AND HAS ACTUALLY IMPEDED PROTECTION OF RELIGIOUS INDIVIDUALS' EXERCISE OF THEIR RIGHTS OF CONSCIENCE.

This Court has "identified the individual's freedom of conscience as the central liberty that unifies the various clauses in the First Amendment." *Wallace v. Jaffree*, 105 S. Ct. 2479, 2487 (1985) (citation omitted). In its recent constructions of the Establishment Clause, the Court has noted that the Establishment Clause's purpose is to protect these rights of individual conscience. For example, in *Jaffree* the application of the Establishment Clause to a state "moment of silence" statute was prefaced by a discussion of the need to protect rights of conscience of those of all faiths and those of no faith. 105 S. Ct. at 2488-2489. Similarly, in *Grand Rapids School District v. Ball*, 105 S. Ct. at 3216, 3222 (1985), this Court justified the Establishment Clause largely as a means to protect the rights of religious conscience of those who do not conform to the religious norm. The Court noted:

> For just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance. The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and non-religion. Only in this way can we "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary" and "sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313, 96 L. Ed. 954, 72 S. Ct. 679 (1952).[1]

---

[1] *Grand Rapids School District*, 105 S. Ct. at 3222. This Court also noted that its concern with rights of religious conscience underlay its application of the Establishment Clause in *Grand Rapids'* companion case, *Aguilar v. Felton*, 105 S. Ct. 3232, 3237 (1985).

Although this Court has isolated freedom of religious conscience as the primary value underlying the Establishment Clause, application of this Clause has not been guided by determinations of whether a decision will aid the exercise of rights of religious conscience. In *Engel v. Vitale*, 370 U.S. 421, 430 (1962), the Court noted that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not." Predictably, this Court's failure to utilize the underlying interest of freedom of religious conscience to regulate its application of the Establishment Clause has resulted in decisions which, in practice, have not effectively and equally protected the rights to freedom of religious conscience of all individuals.

The Establishment Clause has most effectively been used to prevent governmental assistance to those who have professed religious beliefs. A simple survey of the Court's Establishment Clause cases since *Everson v. Board of Education*, 330 U.S. 1 (1947), reveals a clear pattern of utilization of the Establishment Clause to prevent any significant governmental aid or assistance to individuals or institutions who profess religious beliefs. However, this history is almost devoid of examples in which persons of religious conscience have been able to utilize the Establishment Clause to prevent government advanced hostility to their religious beliefs. In this case, for example, despite the clear hostility of a social security number requirement to Roy's Abenaki religion, it would be difficult to perceive of this Court seriously treating this matter as an Establishment Clause violation.

The import of this Court's Establishment Clause cases, however, extends beyond the Court's simple failure to affirmatively utilize the Establishment Clause as a vehicle to advance religiously-motivated individuals' rights of conscience. Because the Establishment Clause's policy of protection of individual rights of conscience has been largely disregarded in favor of mechanistic reversal of provisions "aiding" religion, this Court has generally failed to adequately con-

sider the adverse effects of its Establishment Clause decisions on the very rights of freedom of conscience held to underlie the Establishment Clause. For example, the *Jaffree* decision may have limited the exercise of religiously-motivated individuals' rights of conscience far more than the invalidated statute had limited the rights of conscience of the non-religious individual who brought the action. Similarly, the *Grand Rapids* and *Aguilar* may create a hardship on religiously-motivated parents' exercise of their rights of conscience far exceeding the invalidated programs' infringement upon anyone's rights of conscience. Likewise, the Court's decision in *Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. at 2914 (1985), may have a negative effect upon the exercise of the rights of conscience of Sabbatarians greatly exceeding any negative effect protection of Sabbatarian rights had upon the exercise of rights of conscience of non-Sabbatarians. In short, this Court's vigorous and expansive application of the Establishment Clause to invalidate programs benefitting religiously-motivated individuals, without thorough consideration of the impact of these decisions upon the rights of conscience of religiously-oriented individuals, has resulted in a situation in which the Establishment Clause's application has not only failed to affirmatively aid religiously-oriented individuals' rights of conscience, but may well have interfered with such rights.

The true problem, however, may not be the actual effect of Establishment Clause decisions upon these rights of conscience. Establishment Clause objections might well be avoided in each of these cases by legislation drawn carefully in response to this Court's decisions. However, the real difficulty probably lies in legislative and public opinion which, influenced by the tone of this Court's decisions, concludes that legislation to aid the religious individual's exercise of religious conscience violates the "separation of church and state." Legislators understandably fear that their efforts to accommodate the rights of conscience of religiously-oriented individuals will lead to adverse court decisions with accompanying attorney's fees awards.

In short, the Court's expansive application of the Establish-

ment Clause to suppress governmental aid to religiously-oriented individuals, combined with its failure to apply the clause in a similarly expansive fashion to the establishment of irreligion, has required that religiously-oriented individuals find a means to protect their rights of religious conscience which will be immune from Establishment Clause scrutiny. Fortunately, the Free Exercise Clause, as interpreted by this Court's decisions, provides just this type of effective protection of rights of religious conscience.

II.

IN LIGHT OF THE PRACTICAL RESULTS ARISING FROM THIS COURT'S ESTABLISHMENT CLAUSE PRECEDENT, VIGOROUS JUDICIAL ENFORCEMENT OF THE FREE EXERCISE CLAUSE IS NECESSARY FOR THE PROTECTION OF RELIGIOUS INDIVIDUALS' EXERCISE OF THEIR RIGHTS OF CONSCIENCE.

In sharp contrast to this Court's application of the Establishment Clause, this Court's application of the Free Exercise Clause has provided immeasurable assistance to religious individuals' exercise of rights of religious conscience. The Free Exercise Clause has proven to be a most worthwhile tool in defending individuals, in a judicial setting, from governmental actions which contravened their rights of religious conscience. Examples of this Court's willingness to use the Free Exercise Clause to affirmatively protect religious individuals' exercise of rights of conscience include protection of several Amish parents' rights to educate their children in accordance with their religious beliefs, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a Sabbatarian's right to receive unemployment benefits without compromising religious beliefs, *Sherbert v. Verner*, 374 U.S. 398 (1963) and a Jehovah's Witness' right to receive unemployment benefits without continuing to work in a religiously objectionable setting, *Thomas v. Review Board*, 450 U.S. 707 (1981).

The interpretation of the Free Exercise Clause found in these cases has a number of attributes which are most

beneficial to religious individuals' exercise of their rights of conscience. First, and most importantly, Free Exercise adjudication has been closely tied to the prevention of direct, governmental action which exhibits a coercive effect upon religious exercise. *See Engel v. Vitale*, 370 U.S. 421, 430 (1962). Thus, the religiously-oriented individual can simply point to coercion suffered and receive protection, without relying upon Establishment Clause precedent with its historic anti-religious slant.

Nearly as important for the individual bringing a Free Exercise claim is the insulation such claims have enjoyed from rigid Establishment Clause scrutiny. While state legislation designed to protect a Sabbatarian's rights might be held to run afoul of the Establishment Clause, a Sabbatarian can enjoy protection under the Free Exercise Clause without concern over whether such protection violates the Establishment Clause.[9] Indeed, in his dissent in *Thomas*, 450 U.S. at 724-726, Justice Rehnquist observed that a thorough application of the Court's Establishment Clause precedent might not have permitted a voluntary (legislative) accommodation of the type the *Thomas* court held mandated by the Free Exercise Clause. Thus, while a person enjoying legislative protection of his exercise of rights of religious conscience might worry about the vulnerability of his protection under the Establishment Clause, the person enjoying comprehensive judicial protection under the Free Exercise Clause receives protection geared to his individual needs without worry that his protection could be found to be an impermissible establishment of religion.

---

[9] *Compare Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. 2914 (1985) with *Sherbert v. Verner*, 374 U.S. 398 (1963). Although *Estate of Thornton* involved a statute applicable to private sector employment and *Sherbert* involved regulations governing state unemployment benefits, this distinction did not appear central to this Court's decision in *Thornton*. A reading of the language of the *Thornton* Court would indicate that its rationale might well be applied to state programs providing the same type of absolute protection to the rights of conscience of religiously-motivated individuals.

Judicial protection under the Free Exercise Clause is also a superior means of protecting religious beliefs because it does not require the religiously-motivated individual to wait for legislative action on his behalf. Instead, a means is always readily available for the religiously-oriented individual to protect his rights to free religious exercise. This is particularly important for members of small religious minorities, such as the Abenakis involved in this matter who might not receive suitable legislative action on their behalf.

The final significant positive attribute of this Court's Free Exercise precedent is its flexible, individually-oriented accommodation of religious exercise to legitimate governmental needs. In this case the Government has attacked this type of approach in favor of a more "program" oriented approach. Amicus, however, asserts that an individual, rather than programmatic, approach is most suitable to resolution of this matter.

Initially, the Government's utilization of Free Speech precedent to support a programmatic approach is unpersuasive. Unlike public forum determinations in free speech cases, in which a finding of constitutional protection subjects governmental interests to impositions far beyond those represented by the particular plaintiff, a Free Exercise Claim will normally involve balancing the interests of the state with the needs of a specific, religiously-motivated individual or a discrete group of religiously-motivated individuals. While a Free Speech claim would open a forum to all interested speakers, a Free Exercise claim would only require accommodation of individuals sharing the same type of religious convictions as those involved in a particular case. Thus, contrary to the Government's implication, it does not necessarily follow that the accommodation of certain individuals' rights of conscience will require universal accommodation.

The Court's individually-oriented approach to the Free Exercise Clause also properly considers the number of persons requesting an exemption from generally applicable legislation in determining the propriety of an exemption. If only a few persons would ever request a particular exemption, this would certainly seem relevant to the determination of the

compelling character of a governmental interest. Unless the interest were truly one requiring an "exceptionless" system, *see U.S. v. Lee*, 455 U.S. 252, 258-261 (1982), this factor would be useful to determining the compelling nature of the governmental interest justifying denial of an accommodation. Contrary to the Government's suggestion, this does not necessarily mean that members of large religious groups will enjoy lesser Free Exercise protection than members of smaller groups. Initially, a larger group's concerns likely will have been taken into account in the legislative process. This means that laws of general application will less frequently conflict with such widespread interests. Further, the imposition upon a large number of people, with its possible adverse effect upon program compliance, will lessen the likelihood that governmental interests would outweigh widely held conflicting religious interests. Since widespread, religiously-based resistance to a governmental program would make the governmental program less workable, while at the same time increasing the scope of the imposition upon free exercise of religion, it would seem likely that programs imposing on the religious conscience rights of large numbers would encounter significant Free Exercise problems which might require invalidation of offensive aspects of the program irrespective of the ease of accommodation.

In short, the Free Exercise Clause provides an efficacious method for judicial protection of rights of religious conscience on an individualized basis. It should continue to be interpreted in a flexible manner which recognizes the individualized character of the protection involved and the central importance of the religiously-motivated individual's rights of conscience. Since religiously-motivated individuals' rights of conscience may be infringed upon, rather than aided by rigid application of Establishment Clause precedent, the continued vitality of the Free Exercise Clause is exceedingly important to the preservation of the individual rights of conscience which underlie each of the different clauses of the First Amendment.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

STEVEN FREDERICK MCDOWELL
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

Counsel of Record for
Amicus Curiae

OCTOBER 4, 1985

No. 84-780

Supreme Court, U.S.
FILED
OCT 9 1985
JOSEPH F. SPANIOL
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Appellants,

v.

STEPHEN J. ROY, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OF THE RUTHERFORD INSTITUTE, THE RUTHERFORD INSTITUTE OF ALABAMA, THE RUTHERFORD INSTITUTE OF GEORGIA, THE RUTHERFORD INSTITUTE OF MINNESOTA, THE RUTHERFORD INSTITUTE OF MONTANA, THE RUTHERFORD INSTITUTE OF TENNESSEE, THE RUTHERFORD INSTITUTE OF TEXAS, AND THE RUTHERFORD INSTITUTE OF VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE APPELLEES

John W. Whitehead
Counsel of Record
James J. Knicely
D. Kevin Ikenberry
The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0100

Thomas O. Kovour
The Rutherford Institute
of Alabama
317 North Hull Street
Montgomery, Alabama 36104

Wendell R. Bird
William B. Hollberg
The Rutherford Institute
of Georgia
1275 Peachtree St., N.E.
Atlanta, Georgia 30309

Tony P. Trimble
The Rutherford Institute
of Minnesota
316 East Main
Anoka, Minnesota 55303

J. Douglas Alexander
The Rutherford Institute
of Montana
104 Second Avenue, S.W.
Sidney, Montana 59270

Les Bailey
The Rutherford Institute
of Tennessee
710 East Sullivan Street
Kingsport, Tennessee 37660

W. Charles Bundren
The Rutherford Institute
of Texas
4300 Interfirst One
Dallas, Texas 75202

Guy O. Farley, Jr.
The Rutherford Institute
of Virginia
10521 Judicial Place
Fairfax, Virginia 22030

Attorneys for Amici Curiae

BEST AVAILABLE COPY

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Interest of Amici Curiae 1

Statement of Facts 2

Summary of Argument 2

Argument

I. The Government's Denial of Public Benefits For Little Bird Of The Snow Exerts An Unconstitutional Condition Upon Appellees' Religious Liberty 4

II. The Appropriate Standard In This Case Is The Compelling Interest-Least Restrictive Means Standard Enunciated In *Sherbert v. Verner*, Not The Balancing Approach Set Forth In *Wisconsin v. Yoder* 7

A. The Court Applied The Correct Free Exercise Standard In The Present Case 10

B. Ad Hoc Balancing Is Inappropriate In This Case Because It Inadequately Values An Individual's Right To The Free Exercise Of Religion 13

III. *United States v. Lee* Is Inappropriate For The Resolution Of This Case

A. The Facts of *Lee* Restrict Its Application To Claims Of Tax Exemption Not To Claims For Government Benefits 15

B. *United States v. Lee* Is *Sui Generis* As A Precedent In Free Exercise Cases 20

Conclusion 23

TABLE OF AUTHORITIES

Cases

PAGE

Braunfeld v. Brown, 366 U.S. 599 (1961) 17, 21, 22

Brown v. State, 669 S.W.2d 441 (Ark. 1984) 9

Delconte v. North Carolina, 65 N.C. Ct. App. 262, 308 S.E.2d 898 (1983) 9

Jacobo Marti & Sons, Inc. v. NLRB, 676 F.2d 975 (3rd Cir. 1982) 20

Jensen v. Quaring, 53 U.S.L.W. 4787 (U.S. June 17, 1985) 6

Jernigan v. State, 412 So.2d 1242 (Ala. 1982) 9

Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984) 6

Roy v. Cohen, 590 F. Supp. 600 (M.D. Pa. 1984) 5-7, 10-15, 18, 19, 21, 22

Sherbert v. Verner, 374 U.S. 398 (1963) 3, 5, 6, 7, 8, 11-14, 21, 22, 23

Speiser v. Randall, 357 U.S. 513 (1958) 6

State v. Rivinius, 328 N.W.2d 220 (N.D.1982) 9

Thomas v. Review Board, 450 U.S. 707 (1981) 3, 6, 9, 11-13, 17, 21-23

Tressler Ruthera Home for Children v. NLRB, 677 F. 2d 302 (3rd Cir. 1982) 20

United States v. Lee, 455 U.S. 252 (1982) 3, 14, 15, 18-22

West Virginia v. Riddle, 285 S.E.2d 359 (W.Va. 1981) 9

Wisconsin v. Yoder, 406 U.S. 205 (1972) 3, 6, 8, 10, 13

Statutes

26 U.S.C. 1402(g) (1979) 16

Federal Insurance Contributions Act, Pub. L. No. 591, 68A Stat. 415 (1954) 16

Federal Unemployment Tax Act, Pub. L. No. 591, 68A Stat. 439 (1954) 17

Other Sources

Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. 327 (1969) 13, 14

Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development-Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381 (1967) 3, 11, 13

Mansfield, *The Religion Clauses of the First Amendment Amid the Philosophy of the Constitution*, 72 Calif. L. Rev. 847 (1984) 20

Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 Duke L. J. 1217 ..... 9, 13, 14

Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545 (1983) 10

Note, *United States v. Lee: An Insensitive Approach to the Free Exercise of Religion*, 18 Tulsa L.J. 305 (1982) 8, 14, 21, 22

Note, *United States v. Lee: Limitation on the Free Exercise of Religion*, 28 Loyola L. Rev. 1216 (1982) 21

Shetreet, *Exemptions and Privileges on Grounds of Religion and Conscience*, 62 Ky. L. J. 377 (1974) 21

Smith, *The Constitution and Autonomy*, 60 Tex. L. Rev. 175 (1982) 21

IN THE

Supreme Court of the United States

October Term, 1985

No. 84-780

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Appellants,

v.

STEPHEN J. ROY, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OF THE RUTHERFORD INSTITUTE, THE RUTHERFORD INSTITUTE OF ALABAMA, THE RUTHERFORD INSTITUTE OF GEORGIA, THE RUTHERFORD INSTITUTE OF MINNESOTA, THE RUTHERFORD INSTITUTE OF MONTANA, THE RUTHERFORD INSTITUTE OF TENNESSEE, THE RUTHERFORD INSTITUTE OF TEXAS, AND THE RUTHERFORD INSTITUTE OF VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE APPELLEES

INTEREST OF AMICI CURIAE[1]

This case presents important issues concerning the rights of recipients of governmental benefits. This Court has long recognized the principle that general welfare benefits

[1]Counsel of record to the parties in the case described above have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

must be dispensed without the imposition of special burdens on the free exercise rights of the recipients thereof, particularly when there are less restrictive means to accomplish the governmental objective. In this case, free exercise rights should not be subordinated to the inferior governmental interest in the efficiency or administrative convenience of its welfare system. The Rutherford Institute believes that the decision of the District Court was correct and should be upheld.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. With state chapters in Alabama, Georgia, Minnesota, Montana, Tennessee, Texas and Virginia and its national office in Manassas, Virginia, The Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to First Amendment religious freedoms. Counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amici curiae adopt by reference the statement of facts as set forth in Appellees' brief filed with this Court.

SUMMARY OF ARGUMENT

The mandatory assignment of a Social Security number and the threatened denial of benefits to Appellees constitute an impermissible burden upon the free exercise of Appellees' religious beliefs. The Government cannot condition the availability of public benefits upon conduct mandated by Appellees' religious beliefs, thereby causing them to modify their behavior or violate their beliefs. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Board*, 450 U.S. 707 (1981). The governmental

interest in assigning Social Security numbers is not of the "highest order," but is limited, as in *Sherbert* and *Thomas*, to preventing fraudulent welfare claims and maintaining correct claimant information. This interest, unlike those found in *Wisconsin v. Yoder*, 406 U.S. 204 (1972) (universal education) and *United States v. Lee*, 455 U.S. 252 (1982) (payment of taxes), can hardly be described as "compelling." Moreover, the Government has other viable, less restrictive means available to accomplish its objectives. As such, Appellees' sincere religious belief should not be unduly burdened when there are alternative forms to achieve the governmental objectives. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

United States v. Lee, 455 U.S. 252 (1982) is not dispositive in this case. *Lee* involved the paramount governmental interest in preserving the system of taxation. Granting exemption from payment of taxes would otherwise have subjected the governmental revenue base to a wide variety of religious beliefs. In contrast, the present case is limited to the mere administrative concerns of preventing fraudulent claims and erroneous welfare payments.

ARGUMENT

I.

The Government's Denial Of Public Benefits For Little Bird Of The Snow Exerts An Unconstitutional Condition Upon Appellees' Religious Liberty.

In free exercise cases where the Government withholds benefits because of an individual's adherence to religious beliefs, the issue is raised whether the State is withholding benefits on the basis of an unconstitutional condition. To comply with the Government's requirement to obtain benefits would sacrifice free exercise rights to the Government. Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development - Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1400 (1967). This Court has struck down unconstitutional conditions in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Board*, 450 U.S. 707 (1981), and has consequently exempted claimants from compromising their beliefs for benefits. Otherwise, the State would have "purchased" constitutional rights with its interest in providing welfare benefits. This Court should follow these precedents and exempt Appellees from furnishing their daughter's Social Security number to the welfare department.

This Court succinctly described the debilitating effect of an unconstitutional condition upon a claimant of free exercise rights in *Thomas*. "Where the state conditions receipt of an important benefit upon conduct proscribed by religious faith, or where it denies such a benefit because of conduct mandated by religious belief," the Government wields substantial pressure upon the claimant to modify his conduct and to compromise his religious belief. 450 U.S. at 717-18. In *Thomas*, this Court held that the Government could not withhold unemployment benefits from an individual who asked to be laid off because the

work violated his religious belief. Implicitly, this Court in *Thomas*, relying on *Sherbert*, concluded that for the First Amendment to meaningfully protect religious liberty, it must secure the means of an individual's religious expression. *Id.* at 718. However, the expression must not pose a "substantial threat to public safety, peace, or order." *Sherbert*, 374 U.S. at 403.

Appellee Roy's religious belief impels him to refuse to furnish Little Bird of the Snow's Social Security number to the welfare department. 590 F. Supp. at 605. As in *Sherbert*, the exerted pressure on the eligible beneficiary to conform is "unmistakable." 374 U.S. at 404. With a family at near-subsistence level, no welfare benefits for Little Bird of the Snow, and then no benefits for Little Bird of the Snow's medical expenses, Appellees undoubtedly feel the pressure. 590 F. Supp. at 607. However, Appellees have strictly followed their religious conviction and resisted the pressure. *Id.*[3]

---

[3]Similar to *Thomas* and *Sherbert*, the Government attempted to mold Appellees' conduct into a classification for eligibility. *Id.* at 604. After receiving benefits for Little Bird of the Snow for four months, Appellees were informed by the welfare department of the Social Security number requirement as "a condition for eligibility for benefits." *Id.* at 605. Appellees offered to cooperate with the welfare department in finding alternative solutions for their refusal to produce the Social Security number. *Id.* However, the welfare department refused the opportunity even after initially forcing Appellees to accept the number's dormancy and then providing the benefits without notifying Appellees of the problem or of the "active" nature of the Social Security number. *Id.*

The Government partially succeeded in classifying Appellees by establishing a Social Security number for Little Bird of the Snow contrary to their wishes. *Id.* at 604. However, Appellee Roy did not modify his belief or practice after realizing the value of the benefits Appellees would lose for Little Bird of the Snow. *Id.* at 605.

In the present case, the Government conditioned the benefits upon Appellee Roy's susceptibility to "violate a cardinal principle" of his religious faith for his daughter's welfare. *Sherbert*, 374 U.S. at 406. In *Sherbert* this Court recognized that the Government's "imposition of such a condition . . . threatened to produce a result which the State could not command directly." *Id.* at 405-06, *quoting Speiser v. Randall*, 357 U.S. 513, 526 (1958). Likewise, in the present case, the Government's uniform pattern of identification for applicants does not permit any deviation, even at the expense of violating Appellees' religious liberty, but rather accomplishes indirectly what the State could not otherwise constitutionally command directly. 590 F. Supp. at 605. This is so because viable alternatives exist to further the State's interest. 590 F.Supp. at 613. An unconstitutional condition cannot be justified where there are less restrictive means of achieving the Government's end. *See Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Thomas v. Review Board*, 450 U.S. 707, 718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972); *see also Quaring v. Peterson*, 728 F.2d 1121, 1126 (8th Cir. 1984), *aff'd by an equally divided Court, Jensen v. Quaring*, 53 U.S.L.W. 4787 (U.S. June 17, 1985).[5] The Government's interest in preventing fraudulent claims and maintaining

---

[5]In *Jensen v. Quaring*, the Eighth Circuit held that Nebraska's Department of Motor Vehicles could not require an applicant to submit to having a photograph taken for affixing on the license if the applicant objected to the photograph based on religious beliefs. The court concluded that the requirement was an unconstitutional burden on Quaring's practice of her belief. 728 F.2d at 1125 (*citing Thomas*., 450 U.S. at 717). Under the court's analysis, the pressure on Quaring was "indistinguishable" from the burden on Sherbert. *Id.*

Moreover, the exemption desired by Quaring would not "impair the state's ability to achieve its objective." *Id.* at 1126. Primarily, the court noted the Government's grant of several selective exemptions

correct claimant information can be achieved without requiring Little Bird of the Snow's Social Security number. 590 F.Supp. 607. Exempting Little Bird of the Snow conceivably would require very minimal personnel time without discrete financial expense. *Id.* at 613. It is not an exemption that would render Pennsylvania's welfare statutory scheme "unworkable." *See Sherbert*, 374 U.S. at 408-409. The minimal exemption in the present case, compared to the Government's unyielding claim of compelling interest, exposes the unconstitutional condition imposed by the Government on Appellees' sincerely held religious belief.

II.

The Appropriate Standard In This Case Is the Compelling Interest-Least Restrictive Means Standard Enunciated in *Sherbert v. Verner*, Not the Balancing Approach Set Forth in *Wisconsin v. Yoder*.

Sherbert v. Verner, 374 U.S. 403 (1963), stands as the watershed case for establishing a lucid test of competing interests in the free exercise area. The "compelling state interest-least restrictive means" test announced in *Sherbert* has been successful in establishing a proper and workable balance between compelling Government inter-

---

(footnote 3 continued)

from the photograph requirement. *Id.* For example, the Government allowed learner's permits and special permits for minimal driving to be used without a photograph. *Id.* Therefore, the Government's interest in the public safety and administrative convenience had already been achieved through the lesser restrictive alternatives urged by Quaring. *Id.* Without probing into the credibility of Quaring's belief, the State would be imposing an unconstitutional condition upon the issuance of the license. *Id.* at 1127; *see also United States v. Ballard*, 322 U.S. 78, 85-88 (1944) (questions of truth or falsity of a religious belief properly withheld from a jury in a fraud case).

ests and individual religious liberty interests. Note, *United States v. Lee: An Insensitive Approach to the Free Exercise of Religion*, 18 Tulsa L.J. 305, 320 (1982) (hereinafter Note).

Sherbert's fresh approach to free exercise claims has survived any confinement to its particular facts. In *Wisconsin v. Yoder*, 406 U.S. 204 (1972), the Court reaffirmed the test, but further refined its application and scope by balancing an acknowleged compelling State interest against the sincerely held religious Amish belief. The State's interest in compulsory education was recognized as being at "the very apex" of the State's function. *Id.* at 213. However, the Court subjected this important State interest to a balancing test (*Id.* at 214) ruling that the only State interests that could overbalance legitimate free exercise claims were those of "the highest order and those not otherwise served." *Id.* at 215 . *(citing Sherbert, supra).* As this Court viewed the State's interest in education, it realized that the interest's strength could not preclude comparison to other interests protected by the Constitution.*

After acknowledging the significance of universal education, this Court took judicial notice of Amish self-sufficiency learned through informal, vocational education and the impotency of two additional years of public education for preparing children for their way of life or

---

*The quality of Amish claim in *Yoder* required this Court to balance a neutral law's application advancing important State interests against undue individual discrimination infringing on individual religious liberty interests. 406 U.S. at 220. The Court's concern in *Yoder* for unconstitutional applications of a neutral law broadened *Sherbert*'s protection of free exercise, going beyond mere facial examination of a regulation and its underlying interest. *See* Note, *supra*, at 316, n. 76.

effective participation in society. *Id.* at 213-23. Finding an absence of proof supporting the magnitude of the State's risk in forfeiting two years of an Amish child's public education, and the existence of viable, less restrictive alternatives in the Amish tradition, history and way of life, the Court found that in the circumstances presented, even the compelling State interest in universal education was not sufficient to override the free exercise violation against the Amish.[9]

Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981), silenced any conceivable irresolution between the *Sherbert* compelling State interest-least restrictive means test and the *Yoder* balancing test. Relying on both *Sherbert* and *Yoder*, this Court reversed Indiana's denial of unemployment benefits to Thomas who had quit his job for religious reasons. *Id.* at 720.

After finding an infringement of a sincerely held religious belief, this Court looked for any justification of the incursion through a compelling interest-least restrictive

---

[9]The unique facts of *Yoder* and this Court's detailed emphasis on their embedded cultural and religious traditions has led some lower courts to confine *Yoder*'s rationale. E.g., *Brown v. State*, 669 S.W. 2d 441 (Ark. 1984); *State v. Rivinius*, 328 N.W.2d 220 (N.D. 1982); *West Virginia v. Riddle*, 285 S.E.2d 359 (W.Va. 1981); *Jernigan v. State*, 412 So.2d 1242 (Ala. 1982); *Delconte v. North Carolina*, 65 N.C. Ct. App. 262, 308 S.E.2d 898 (1983). However, the thorough enumeration of Amish traditions, history, and beliefs did not define the *sine qua non* for religious exemption in the free exercise area. Instead, this Court used the Amish model to illustrate the sincerity and the functional quality of their religious beliefs for purposes of comparison to the asserted State interests. Marcus, *The Forum of Conscience: Applying Standards Under The Free Exercise Clause*, 1973 Duke L.J. 1217, 1230.

means test. *Id.* This Court compared the State's interest in *Thomas* to the rejected interest in *Sherbert*, i.e., the integrity of the public insurance fund. *Id.* at 719, n. 12. Consequently, no compelling State interest was found that would justify the violation of Thomas' free exercise. *Id.*

In each of these three cases, a "compelling State interest-least restrictive alternative" test has been uniformly applied to determine the strength of the competing interests. *See* Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545, 546 (1983). *Yoder* goes one step further to require balancing to determine whether a compelling State interest, once found, is sufficient to override a bona fide free exercise claim.

A. The Court Applied The Correct Free Exercise Standard In The Present Case.

In this case, the lower court struck a middle ground between the parties when it labeled the governing standard as a "reasonable less restrictive means" test. 590 F. Supp. at 611. Acknowledging the Government's strong general interest in maintaining the integrity of the Social Security number, it nevertheless concluded that the Appellees would prevail if lesser restrictive alternatives could be used without unreasonable cost to the Government. *Id.* Superficially, the court below made reference to a cost/benefit analysis, but otherwise, the court's test resembled the conventional compelling interest-least restrictive means test.

Although the lower court did not discern whether all the available alternatives to the Social Security number were reasonable compared to others, nor actually employed a cost/benefit analysis (*id.* at 612-613), it did explore the exemption as one possible alternative and found the viability of the exemption to be well-founded because the

resulting harm to the State would be remote. *Id.* With a viable alternative existing, the State's denial of beneifts could not *ipso facto* be the least restrictive means available to further its interest.

This type of analysis follows precisely the analysis in *Sherbert* and *Thomas*. The court analyzed the sincerity and credibility of Appellees' religious belief, the weight of the Government's interest, the irrelevance of administrative convenience, and the infringement of Appellees' free exercise of religion.* The Government's interest in using computer systems and the Social Security number was found to be substantial, not "essential" or compelling on its face. 590 F. Supp. at 610, 613. The chief reason why the Government's interest should not prevail is because there

---

*The *Yoder* balancing approach was not necessary in this case because of the *absence* of a compelling State interest. *Yoder* focused on the interplay between the interests because the *implementation* of an acknowledged compelling State interest was threatened, not merely the *integrity* of a lesser interest as in *Sherbert* and *Thomas*. In the latter two cases, this Court used a compelling interest-least restrictive means analysis because the religious exemption actually advanced the fundamental purpose of the public benefit laws. *See generally* Gianella, *Religious Liberty, Non-establishment, and Doctrinal Development- Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1401 (1967). Similarly, in this case, the exemption for Appellee Roy would fulfill the Government's purpose of alleviating individual hardship. On the other hand, the *Yoder* approach went further and emphasized the depth of the Amish commitment to isolationism, and the ways in which the Amish practices actually advanced the State's interest rather than impeded it. The Court in all three cases searched for a compelling interest, but found one only in *Yoder*, thereby necessitating the further balancing of the State and individual religious liberty interests.

are lesser restrictive means available to practically achieve the goal of alleviating individual hardship as in *Sherbert* and *Thomas*. For example, the requirement of identifying factors for Little Bird of the Snow other than the Social Security number and the uniqueness of her name would supply the Government's need for exact identification. *Id.* at 613. In contrast to *Sherbert* and *Thomas*, these alternatives, in effect, a *partial* exemption, are more viable than wholesale exemption from participation in the Social Security system. As this Court has stressed, where there are alternatives acceptable to both parties, courts should always grant the exemption in favor of free exercise of religion.

A key phrase in *Sherbert's* least restrictive means standard is that "no alternative forms . . . [exist to] combat [anticipated] abuses." 374 U.S. at 407. Essentially, this is the thrust of the "reasonable less restrictive alternatives" test in the lower court's analysis. This standard will not allow the Appellees to prevail unless the Government's interest cannot be substantially furthered in at least some other practical way.

The facts and the formulation of issues in the present case necessitate the use of the analysis set forth in *Sherbert* and *Thomas*. Appellees' application for benefits is to lessen the hardship on Little Bird of the Snow. The denial of these benefits is based solely on their religious practice of refusing to furnish Little Bird's Social Security number. 590 F. Supp. at 605. As in *Thomas* and *Sherbert*, this denial creates an unconstitutional condition on the receipt of public benefits. Even the Government's interest in the integrity of the public benefit system is identical in these cases.

More importantly, Appellee Roy's beliefs is sincerely religious, central to his membership in the Native American Indian tradition and greatly affects his daily

life. Id. at 604-05. The quality of his claim equals or may surpass the claim of infringement in *Yoder*. 406 U.S. at 216. The Abenaki tradition of burying a child's placenta protects the child's autonomy. 590 F. Supp. at 604-05. Control is "indispensable to becoming a holy person." The use of computers would rob Little Bird of the Snow of that control. *Id.* Appellee Roy's belief is not one "so bizarre, so clearly nonreligious" as not to require protection. *Thomas*, 450 U.S. at 715. This belief is common to the Native American Indians, a culturally bound group older than the Amish. *See Yoder*, 406 U.S. at 210. Even the apparent inconsistency within Appellees' religious practices cannot defeat their claim. 590 F. Supp. at 610. Appellee Roy, as a father, has drawn a line for Little Bird of the Snow's welfare because of his religious belief. *Accord, Thomas*, 450 U.S. at 715. This line compelled Appellee Roy to sacrifice daily the benefits from the Social Security Administration. 590 F. Supp. at 610. Unlike the facts of *Yoder*, Appellee Roy attempts to live *in* a society "at odds" with his traditional religious beliefs. *Id.* Therefore, the nature of the benefits, Roy's conviction, and his willingness to adapt to modern society like those involved in *Sherbert* and *Thomas*, require this Court to apply the analysis found in those cases.

B. Ad Hoc Balancing Is Inappropriate In This Case Because It Inadequately Values An Individual's Right To The Free Exercise Of Religion.

Mere balancing of competing interests is not appropriate in this case for a number of reasons. First, as in *Sherbert* and *Thomas*, there is no State interest of the "highest order." *See Thomas v. Review Board*, 450 U.S. at 718. Moreover, as the lower court in this case indicated, the mere formless balancing of particular facts "would

effectively guarantee victory for the government in every case." 590 F. Supp. at 611. Ad hoc balancing frames issues in broad terms that encourage subjectivity and is appropriate only for those cases involving the conflict of constitutional rights and obligations of the highest magnitude. *Yoder*, 406 U.S. at 213, 215; Marcus, *supra*, at 1240; *see also* Gianella, *supra*, at 1383-84; Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. 327, 330, 332 (1969).

In the absence of a potentially overriding governmental interest, some restraint is needed to stabilize the individual's interest against the State interest because it is more than mere coincidence "that the government usually prevails." Marcus, *supra*, at 1241. The compelling interest-least restrictive means test advanced by *Sherbert* best achieves a stable structure in the free exercise area requiring an evaluation of available alternatives, if any, to achieve the governmental objective. *Id.* Because administrative problems and efficiency constitute the core of the Government's interest in the present case (590 F. Supp. at 612, 613), the existence of workable administrative alternatives diminishes the Government's interests, and properly values Appellees' free exercise rights.

Second, a "balancing" test is inconsistent with the constitutional principle of recognizing exemptions from universally applied laws where the law conflicts with sincerely held religious beliefs. *Id.* at 611. This pitfall in a wholesale application of the balancing approach detracts from the consideration of valid individual rights of free exercise and the value of that right to the individual. Clark, *supra*, at 337. "The cost to a principled individual of failing to do his moral duty is severe, in terms of supernatural sanction or loss of moral self-respect." *Id.* Such is the plight of Appellees and their continued refusal to comply is more than inevitable. It is involuntary. Clearly, this Court should not depreciate Appellees'

belief, as the Government urges, through a blind invocation of a "balancing" test.

Finally, a balancing approach engenders dangerous generalizations that, in effect, often determine the outcome. Note, *supra*, at 333-334. For example, in *United States v. Lee*, 455 U.S. 252 (1982), this Court gave short shrift to the impact of Government's denial of a tax exemption on the religious practices of the Amish. Instead, the Court glossed over the probable impact on individual liberties, motivated by the "common good" derived from a system of taxation. 455 U.S. at 259. This somewhat indiscriminate approach cheapens the value of free exercise claims similar to Appellees'. Exceptional claims, like Appellees', should at least be entitled to consideration for constitutionally required exemptions granted after the most specific analysis available.

III.

United States v. Lee Is Inappropriate For The Resolution Of This Case.

The Government in this case relies primarily upon *United States v. Lee*, 455 U.S. 252 (1982) as dispositive of the issues. Indiscriminate application of *United States v. Lee*, however, ignores three significant distinctions between *Lee* and the present case. First, the factual pattern in *Lee* circumscribes its holding to issues involving *payment* or *nonpayment* of taxes. Second, the potential harm to the Government in *Lee* was immediate and concrete whereas any harm to the Government in this case, as the court below found, would be remote. 590 F. Supp. at 611-12. Third, the dominance of the tax issue in *Lee* is in stark contrast to the severity of the free exercise claim in this case. Note, *supra*, at 325.

A. The Facts of *Lee* Restrict Its Application To Claims Involving Exemption From Payment Of Taxes, Not To Claims For Governmental Benefits.

In *Lee*, a member of the Old Order Amish had hired other Amish to work with him in his carpentry shop and on his farm. Although Lee's income from self-employment was exempt from Social Security taxes under the provision for persons religiously opposed to public insurance (26 U.S.C. 1402(g), this exemption did not relieve him from tax liability for failure to withhold taxes assessed on employees' wages. Federal Insurance Contributions Act (F.I.C.A.), Pub. L. No. 591, 68A Stat. 415 (1954) (codified at 26 U.S.C. 3101-26); Federal Unemployment Tax Act (F.U.T.A.), Pub. L. No. 591, 68A Stat. 439 (1954) (codified at 26 U.S.C. 3101-11). Since 1970, *Lee* had failed to file the required quarterly returns, failed to withhold the F.I.C.A. tax from the employees' wages and failed to pay his share of the F.I.C.A. and F.U.T.A. excise tax. 455 U.S. at 254. Thereafter, the Internal Revenue Service assessed liability and Lee sued for a refund on the basis of a violation of his and his employees' free exercise of religion. 455 U.S. at 255.

The district court applied a "compelling interest-least restrictive means" test and upheld Lee's claim of unconstitutional restraint on his free exercise of religion. *United States v. Lee*, 497 F. Supp. 180, 184 (W.D. Pa. 1980). Specifically, the court found that the Government's loss of revenue would be negligible and that the Amish provided services for their members to displace the need for Government assistance. *Id.* at 183. Combining these two facts, the court held that the resulting burden on Lee's free exercise outweighed the Government's interest. *Id.*

On appeal, this Court reversed the district court after dismissing Lee's entitlement to the statutory exemption.

Therefore, the issue was whether Lee should be constitutionally exempt from the tax. This Court framed the initial inquiry in terms of whether the payment of Social Security taxes and receipt of benefits interfered with Lee's free exercise rights. After noting pertinent Amish beliefs and refusing to be "arbiter of scripture," the Court acknowledged perfunctorily that the compulsory participation in the tax system violated Lee's free exercise rights. 455 U.S. at 257 (*citing Thomas v. Review Board of Indiana Employment Security*, 450 U.S. 707, 716 (1981)).

Second, this Court recognized that the mere existence of a burden was not decisive, but that an "overriding government interest" could justify an infringement of Lee's free exercise. 455 U.S. at 257-58.[7] This Court concluded that the governmental interest in a nation wide tax program based on complex actuarial factors was obvious. *Id.* Discussion of this "very high" interest disclosed the powerful influence of the tax undercurrent. Implicitly, the decision hinged upon the system's vitality because of its comprehensive and mandatory nature. *Id.*

Third, this Court inverted the free exercise analysis to determine whether Lee's belief would "unduly interfere" with the Government's interest. *Id.* at 259. Even though the Court acknowledged possible accommodation of religious beliefs, it specifically emphasized the difficulty in accommodating religious beliefs involving the payment of taxes. *Id.*, *quoting Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). The Court noted that granting an exemption to the obligation to pay Social Security taxes is different because

---

[7]Somewhat surprisingly, the Court cited *Thomas* and *Sherbert v. Verner*, 374 U.S. 398 (1963), to support its reasoning. These cases, however, employed a "compelling interest-least restrictive means" standard to invalidate a burden on free exercise. Note, *supra*, at 321-20.

there is no principled distinction between payment of Social Security taxes and payment of taxes in general. As such, the entire revenue base of Government would be in jeopardy from a wide variety of religious beliefs.

The resolute indicia of *Lee*'s limited holding is apparent from this Court's expressed view of the facts in that case. In *Lee*, the Government's interest was to raise taxes from voluntary commercial activity not to compel the acceptance of benefits.[4] However, in the present case, the purpose of a Social Security number is for governmental convenience to guard against fraudulent claims or erroneous payments based on misidentification. 590 F. Supp. at 606-07. Needless to say, a religious exemption from paying taxes on a voluntary commercial activity contrasts sharply with a religious exemption from using a Social Security number to obtain welfare. In the present case, there is no evidence to indicate an unmanageable number of claims similar to Appellee Roy's. 590 F. Supp. at 612. Moreover, the Government has viable alternatives both to further its administrative objectives and to accommodate the religious beliefs. The alternative to a number would be simply to use Appellees' daughter's unique name, Little Bird of the Snow, or utilize other family members' numbers. Both interests of the parties would be assuaged because no evidence exists of another applicant named "Little Bird of the Snow." *Id.* at 613. Even assuming another does exist, the opportunity for fraud remains minimal due to the Government's requirement of other identification accompanying the applicant's name. *Id.* Moreover, Little Bird of the Snow epitomizes a "narrow category that is readily identifiable" for purposes of administrative manageability

---

[4]The Court described Lee's actions as a voluntary choice of entering a commercial venture and assuming the status and obligations of an employer. 455 U.S. at 261.

by virtue of her unique name and identifying factors. *See United States v. Lee*, 455 U.S. at 260-261.

Unlike the plaintiff in *Lee*, Appellee Roy's refusal to provide a Social Security number for Little Bird of the Snow generates, at most, a speculative adverse impact on the Government's interest in efficiency. Interface between the welfare program and computer necessitates the use of digital characters for efficiency. 590 F. Supp. at 610. However, the Federal Government requires the furnishing of Social Security numbers as a condition of eligibility for Government assistance. *Id.* at 605. This latter requirement implies that the number is needed for mere operation of the program (not just its efficiency). Yet, the welfare department admitted that it can distribute benefits and protect against fraud without using the computers. *Id.* at 613. Only one situation in an interstate context would generate difficulty and its occurrence is remote. *Id.* The Government's requirement of a Social Security number, although lessening the workload on the welfare department for its extensive welfare rolls, does not void the Government's interest in providing a welfare system, as an exemption from taxes in *Lee* would have eliminated part and threatened all of the tax system. The Government's interest in the present case, therefore, is greatly diminished in comparison to *Lee*.[9]

---

[9]Unlike Lee's free choice, Appellee Roy did not freely choose to participate in the issuance of a number to Little Bird of the Snow. After Little Bird of the Snow's birth, her mother signed an application for the number without Appellee Roy's knowledge and without remembering her actions. 590 F.Supp. at 604. Once the Social Security Administration issued the number, Appellees desired to revoke it, but instead the Administration rendered it "dormant." *Id.* Also, Appellee Roy refused to participate in the number's usage and willingly tried to offer an alternative to ameliorate the refusal, but the Government rejected any cooperative effort and denied the welfare benefits. *Id.* at 605.

The Government's inflated interest in administrative convenience pales beside Appellees' legitimate free exercise claim of caring for their daughter in the religious tradition of the Abenaki Indians. In *Lee*, the plaintiff freely chose to participate in a highly regulated activity. The Government had accommodated Lee's personal religious belief against *personal* payment of self-employer's income tax. However, Lee actually asserted objection to payment of taxes on behalf of *his employees*. 455 U.S. at 261-62. Even though the employees were Amish, it is unclear whether their beliefs paralleled Lee's Old Order Amish beliefs. *See* Mansfield, *The Religion Clauses of the First Amendment Amid the Philosophy of the Constitution*, 72 Calif. L. Rev. 847, 902 (1984). Indirectly, at least, this Court did not grant Lee a constitutional exemption because he did not have associational standing to assert employees' rights. *Id.*[18] By contrast, in this case Appellees' objections are not vicarious, but directly personal to them.

B. *United States v. Lee* Is *Sui Generis* As A Precedent In Free Exercise Cases.

In his concurrence, Justice Stevens observed three problems with this Court's test in *Lee* which suggests its uniqueness and limited application. *See* 455 U.S. at 262-63 (Stevens, J., concurring).

---

[18] *Accord, Jacobo Maya & Sons, Inc. v. NLRB*, 676 F.2d 975 (3rd Cir. 1982) (citing *Lee* in holding that a cheese producing plant employing both Amish and non-Amish could not prohibit unionizing because of Amish employees' religious tenets); *Trenton Ruthers Home for Children v. NLRB*, 677 F.2d 302, 306-07 (3rd Cir. 1982) (preventing unionization of Lutheran House would not violate non-Lutheran worker's right to unionize).

First, Appellees and Little Bird of the Snow represent a "limited class of disadvantaged persons" (*Id.* at 263, n. 3) who should not be judged with standards utilized for neutral laws of general applicability, but on a case-by-case exemption basis. Second, this Court in *Lee* extracted decisive factors from *Braunfeld v. Brown* and engendered a hybrid standard of review that is, in any event, inappropriate to this case. Note, *United States v. Lee: Limitation on the Free Exercise of Religion*, 28 Loyola L. Rev. 1216, 1223 (1982) (hereinafter *Limitations*). Third, the present case, like *Sherbert, and Thomas*, mandates a compelling interest-least restrictive means standard of review. 455 U.S. at 263, n. 3 (Stevens, J., concurring).

The grant of a religious exemption from neutral laws assumes a more justifiable approach when public welfare is at stake. *See generally* Shetreet, *Exemptions and Privileges on Grounds of Religion and Conscience*, 62 Ky. L. J. 377 (1974). In this regard, it is not inappropriate to analyze the motivation for exemption from requirements imposed in connection with public benefits programs. 455 U.S. at 268, n. 3 (Stevens, J., concurring). In the present case the only motivation for Appellees' action consists of a free exercise claim amid a need to provide for Little Bird of the Snow. 590 F. Supp. at 605. Together, these two life forces signify personal freedom protected by the Constitution in the context of material need. *See generally* Smith, *The Constitution and Autonomy*, 60 Tex. L. Rev. 175 (1982); *Braunfeld v. Brown*, 366 U.S. at 614. (Brennan, J., dissenting). Appellee Roy's right to spiritual freedom amid his daughter's need for physical health places him in a limited class of the disadvantaged because of Roy's minority religious belief and his inability to adequately support his family without assistance. 590 F. Supp. at 604-07. Laws which grant public benefits to such persons arguably, in a context of material need, should be judged by a lesser standard of review than that announced in *Lee*.

Lee appears to have revived *Braunfeld*'s rationale despite this Court's emphatic support in *Lee* of the principles announced in *Sherbert* and its progeny. 455 U.S. at 259.; *see* Smith, *supra*, at 188. Justice Stevens indirectly offered a theory for reconciling *Braunfeld* and *Lee* with the *Sherbert* precedent by virtue of the economic motivation present in *Braunfeld* and *Lee*. 455 U.S. at 263, n. 3. As discussed, however, Appellee Roy's claim is purely one of free exercise unadulterated by tax issues or the right to earn a livelihood. The analysis of *Braunfeld* and *Lee* is inappropriate because it employs a hybrid standard that is triggered because of potentially severe and adverse economic consequences inherent in any exemption from the right to earn a livelihood and the payment or nonpayment of taxes.

The present case, therefore, requires the *Sherbert* and *Thomas* standard of review. Several facts are relevant to determine whether the Government's interest is sufficiently compelling. Like Sherbert, Appellee Roy's willingness to comply with the law as closely as permitted by his belief is a critical factor in the analysis. *See* Note, *supra*, at 312, n. 47. Willingness to adhere to the Government's requirement does not suggest defiance of governmental authority. To the contrary, it suggests merely a sharp conflict between a personal constitutional right and the desire to maintain personal freedom in a complex, modern society. 590 F. Supp. at 610.

Like Thomas, Appellee Roy's benefits were conditioned upon required conduct prohibited by religious beliefs. *Accord* Note, *supra*, at 327. In *Thomas*, this Court held this to be unconstitutional because of the Government's compulsion of behavior modification for otherwise entitled benefits. 450 U.S. at 717-18.

Perhaps, the most significant and glaring example of the Government's unfairness to Appellees is the denial of life supporting benefits to their daughter. Appellees' entitle-

ment to welfare arguably surpasses even the interests in *Sherbert* and *Thomas*. In these two cases, the appellants had entered a chosen realm of employment activity. Appellees have not chosen anything but to apply for welfare benefits. Sherbert's and Thomas' choices could be compared to Lee's choice of commercial activity, but Roy cannot be compared to Lee in any manner. Therefore, the injury to Roy is more aggravated in comparison to the injuries suffered in *Sherbert* and *Thomas*.

As a pure free exercise case, *Roy* requires the *Sherbert* and *Thomas* compelling interest-least restrictive means standard of review. *Lee* is *sui generis* to issues involving payment or nonpayment of taxes.

CONCLUSION

We live in an age when Government assumes it has an all-pervasive authority to intervene in virtually all phases of life. While the Government obviously has, in some cases, valid reasons for its conduct, such is not true in the present case.

The issue, however, goes further than the intervention involved. It touches the very heart of religious freedom and the right of parents and children to be let alone within the confines of the institution of the family.

Appellees' fundamental rights are at stake. These rights should not be contravened merely to make the Government's job a bit more convenient.

This Court must, therefore, reject the Government's specious arguments for violating Appellees' constitutional guarantees and uphold the rights of Appellees to be free from the Government entanglement involved in the pre-

sent case. As such, it is essential that the decision below be affirmed.

Respectfully Submitted,

John W. Whitehead
Counsel of Record
James J. Knicely
D. Kevin Ikenberry
The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0100

Thomas O. Kotouc
The Rutherford Institute
of Alabama
Box 59561
Birmingham, Alabama 35259

Wendell R. Bird
William B. Hollberg
The Rutherford Institute
of Georgia
Suite 777
1275 Peachtree St., N.E.
Atlanta, Georgia 30309

Tony Trimble
The Rutherford Institute
of Minnesota
316 East Main
Anoka, Minnesota 55305

J. Douglas Alexander
The Rutherford Institute
of Montana
104 Second Avenue, S.W.
Sidney, Montana 59270

Les Bailey
The Rutherford Institute
of Tennessee
710 East Sullivan Street
Kingsport, Tennessee 37660

W. Charles Bundren
The Rutherford Institute
of Texas
4300 Interfirst One
Dallas, Texas 75202

Guy O. Farley, Jr.
The Rutherford Institute
of Virginia
10521 Judicial Place
Fairfax, Virginia 22030